(20,579.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 236.

LUCINDA BRANDON, PERSONALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ALEXANDER BRANDON, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

NEWTON L. ARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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0 In the Supreme Court of the State of Kansas.

Be it remembered that on the 16th day of October, A. D., 1905, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a Petition in Error and Case-made attached thereto, from the District Court of Allen County, together with the waiver of the issuance of summons in error, and entry of appearance by the defendant in error; which petition in error, case-made, and waiver are in words and figures as follows, to wit:—

1 No. 14673.

Filed Oct. 16, 1905. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

LUCINDA BRANDON, Personally and as Executor of the Estate of Alexandre Brandon, Deceased; EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE MCCALL, BERTHA WALKER, CARRIE KIMBALL, and MINNIE BOEHN, Plaintiffs in Error,

vs.

NEWTON L. ARD, Defendant in Error.

Petition in Error.

Plaintiffs complain of the above named defendant in error, for that heretofore in a certain action then pending in the District Court of Allen County, Kansas, wherein plaintiffs in error were plaintiff-, and defendant in error was defendant, a certain judgment was rendered and orders made in favor of defendant in error, and against plaintiffs in error.

And the plaintiffs say that there was error in said proceedings as follows:

1st. The court erred in the admission of evidence excepted to at the time by plaintiffs in error.

2nd. The judgment was in favor of defendant in error when it should have been in favor of plaintiffs in error.

3rd. The court erred in overruling the motion of plaintiffs for a new trial in said action.

4. And plaintiffs further say that the judgment rendered in said action is contrary to law and is not sustained by the evidence.

5. And plaintiffs in error complain of said judgment and orders in this, that in said action, and in the trial thereof, there was drawn in question the validity of the authority exercised under the statutes of the United States, under which the suit in the United States Circuit Court mentioned and referred to in the evidence introduced in said cause, was instituted and under which said suit was prosecuted.

2 And the court in the rendition of said judgment and in the making of said orders, disregarded rights which plaintiffs had and to which they were entitled under such statute and under

the judgment rendered in said action, in the United States Circuit Court, which was instituted and prosecuted under and by virtue of said statutes.

6. The judgment in this action which is now sought to be set aside is a decision against a right claimed by plaintiffs in error, under the United States Statutes, by authority of which the case of the United States *vs.* The Mc. Kansas & Texas Railway Co. *et al.* mentioned in the evidence was instituted and prosecuted.

7. That under the Statutes of the United States, under which said action in said Federal court was instituted and prosecuted, the title and right of plaintiffs in error, which is now asserted by them, was conclusively established, both as against the United States, and as against the defendant in error, which fact the decision of the court below, by necessary implication ignores.

Wherefore plaintiffs in error ask that the judgment of the court below be reversed, and that they be restored unto all things they have lost thereby.

And that the Court below be instructed to render judgment in favor of plaintiff, upon the agreed statement of facts, and testimony of defendant in error.

KEPLINGER & TRICKETT,
Attorneys for Plaintiffs in Error.

Defendant in Error waives issue and service of summons in error and enters his appearance, in the above cause, this the 28th day of August 1905.

EWING, GARD & GARD,
Attorneys for Defendants in Error.

Filed Oct. 16 1905.

D. A. VALENTINE,
Clerk Supreme Court.

3 Filed July 24, 1905.

C. E. ADAMS.
District Clerk.

Refiled August 12 1905.

C. E. ADAMS,
District Clerk.

In the District Court of Allen County, State of Kansas.

Filed Oct. 16, 1905. D. A. Valentine, Clerk Supreme Court.

LUCINDA BRANDON, Personally, LUCINDA BRANDON, Executrix of the Estate of Alexander Brandon, Deceased; EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE McCALL, BERTHA WALKER, CARRIE KIMBALL, and MINNIE BOEHN, Plaintiffs,

vs.

NEWTON L. ARD, Defendant.

Case-made.

The above named plaintiffs, as and for their case-made in the above entitled cause, state that heretofore on the 16th day of May, 1887, Alexander Brandon filed his petition in the District Court of Allen County, Kansas, which petition is as follows:—

In the District Court of Allen County, Kansas.

ALEXANDER BRANDON, Plaintiff,

vs.

NEWT. L. ARD, Defendant.

Petition.

1st. Plaintiff is the owner and entitled to the immediate possession of the North East quarter of Setion 11, Township 26, Range 20 in Allen County, Kansas, and the defendant wrongfully and unlawfully withholds the same from him.

2nd And for second cause of action plaintiff says that for three years last past the defendant has wrongfully and unlawfully detained possession of the real property described in the foregoing cause of action.

Wherefore, plaintiff has been damaged in the sum of Three Hundred Dollars, for which together with restitution of said premises plaintiff prays judgment.

HUTCHINGS & KEPLINGER,
Att'ys for Pl'ff.

4 On the back of said Petition appear the following endorsements, to-wit: "2689. Brandon *vs.* Ard.—Petition.—Clerk issue summons so as to stand for trial at June Term. L. W. K.—Filed May 16" 1889, M. P. Jacoby, Clerk."

And thereafter, the defendant having been duly served with summons in the above cause filed his answer in said cause, which answer is in words and figures as follows:—

STATE OF KANSAS, *Allen County, ss:*

In the District Court in and for said County and State.

ALEXANDER BRANDON, Plaintiff,
vs.
NEWT. L. ARD, Defendant.

1st. The defendant, for answer to the petition filed by the plaintiff herein, and to each cause of action therein stated, denies each and every allegation in the said several causes of action therein contained.

2nd. And further answering the defendant says that he is the owner and in the actual possession of the N. ½ of North East ¼ Sec. 11, 26, 20, in Allen County, Kansas, and is entitled to the possession of the said land.

Wherefore, the defendant prays judgment against the plaintiff declaring defendant to be the owner of said lands and to be entitled to hold the possession thereof, and for his costs herein expended.

N. L. ARD, *Defendant.*

Endorsed on back as follows: "Alexander Brandon *vs.* N. L. Ard.—Filed June 8th, 1887. M. P. Jacoby, Clerk Dist. Court, by C. E. Merwin, Dep'ty."

And thereafter, said cause came regularly on for trial in June, 1889, and judgment was rendered in favor of plaintiff. Thereupon, the defendant appealed from such decision by petition in error to the Supreme Court, which court affirmed the judgment of the District Court. Thereupon, the defendant appealed said cause to the Supreme Court of the United States, which court, on the 4th of March, 1895, reversed the judgment of the Supreme Court, the opinion being found in 15 S. C. P. 406.

5 And thereafter, Oscar Foust, the Judge of the District Court of Allen County, having been of counsel for the defendant in said action, Travis Morse of the Allen County bar was selected by agreement of the parties to sit as Judge *pro tem.* upon the trial of said cause; and thereafter, by leave of Court, defendant filed an amended answer in said cause, which is as follows:

In the District Court of Allen County, Kansas.

No. 2687.

ALEX. BRANDAN, Plaintiff,
vs.
NEWTON L. ARD, Defendant.

Amended Answer.

Now at this day comes defendant by leave of the court first had and obtained, and files his amended answer herein; and for defense

to the cause of action set out in plaintiff's petition and for answer thereto says:

1*st*. He denies each and every material allegation in said plaintiff's petition contained not hereinafter specially admitted.

2*nd*. For a second and further ground of defence, the defendant alleges that at the commencement of this suit, he had been in the open, notorious, visible and exclusive possession of the land in controversy for more than 15 years.

By reason of all which he asks judgment and for such other and further relief as to the court seems equitable.

EWING, GARD & GARD.

Endorsed on back as follows:—"Brandon *vs.* Ard.—Amended Answer.—E., G. & G."

And thereafter, a trial by jury having been waived by agreement of the parties, said cause came regularly on for trial before said Travis Morse as Judge *Pro Tem.*, the plaintiff appearing by L. W. Keplinger, his attorney, and the defendant appearing by Ewing, Gard & Gard, his attorneys.

And therupon, the plaintiff in support of the issues joined on his part introduced in evidence a patent from the State of Kansas to the M. K. & T. Ry. Co., recorded in Book K at page 393 in the
6 office of the Register of Deeds of Allen County, Kansas, which patent so far as material is in words and figures as follows:

The State of Kansas to all to whom these presents shall come, Greeting:

Whereas, The Missouri, Kansas & Texas Railway Company having constructed a railroad and telegraph line from Junction City to the southern boundaries of the State of Kansas, is entitled under the provision of the act of Congress approved March 3, One thousand eight hundred and sixty three (1863) entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state," and of the act of the legislature of the State of Kansas, approved February 9, one thousand eight hundred and sixty four (1864) entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construtcion of certain railroads and telegraphs" to the following described tracts of land, as certified by the Commissioner of the General land office, and approved by the Secretary of the Interior April 10, One thousand eight hundred and seventy three (1873), namely * * * (Among other tracts) The North East quarter (¼) of Section Eleven (11), Township Twenty six (26), Range Twenty (20), in Allen County, Kansas * * *

Now, know ye that the State of Kansas in consideration of the premises and in conformity with the said law has given and granted and by these presents does give and grant unto the Missouri, Kansas & Texas Railway Company and assigns the said tracts above described, to have and to hold the same together with all rights, privileges, immunities, appurtenances of whatsoever nature accruing

under the provisions of the laws relating thereto, and in accordance with the act of congress of March 3, 1863, set forth in the foregoing, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embodied in the foregoing.

In testimony whereof, I, Thomas A. Ozborn, Governor of the State of Kansas, have caused these letters to be made patent and the seal of the State of Kansas to be hereunto affixed.

Given under my hand at the City of Topeka this nine-
7 teenth day of May in the year of Our Lord One thousand eight hundred and seventy three and the independence of the United States the ninety seventh, and of the thirteenth year of the State.

By the Governor,

THOMAS A. OZBORN,
By W. H. SMALLWOOD,
Secretary of State.

Filed June 13, 1873.
J. S. FAST.

And thereupon, it was agreed as part of the evidence on behalf of plaintiff that whatever title passed by said patent to said M., K. & T. Ry. Co. was by said company conveyed to plaintiff Brandon by Warranty Deed dated December 17, 1888, recorded in Book 9 of Deeds Records of Allen County at page 411.

Also, that said plaintiff contracted with said railroad company for the purchase of the land in question four years prior to the time of the execution of said deed to plaintiff, which contract provided for annual payments until the full amount of the purchase money was paid.

Also, it was admitted that the land in controversy was selected by both companies the M., K. & T. Ry. Co. and the L. L. & G. Ry. Co., August 8, 1872; also that said land was appraised and certified to the State of Kansas for the M., K. & T. Ry. Co. and The L. L. & G. Ry. Co., April 10, 1873, under the act of Congress of March 3rd, 1863.

Also, that said tract is over 12 miles from both said roads and is within the indemnity limits of both roads.

Plaintiff also introduced the pleadings in the case of the United States *vs.* M. K. & T. Ry. Co. *et al.*, in the United States Circuit Court for the District of Kansas.

Substantially and so far as material in this case, the pleadings in said suit were as follows:—The United States was complainant. The M., K. & T. Ry. Co., Alex Brandon and others were defendants. The third Amended Bill of Complaint, filed May 27, 1893, was introduced in evidence. The allegations were set forth in paragraphs numbered consecutively which so far as material, substantially were:

First. That the original Bill was filed Nov. 19, 1886, against the M., K. & T. Ry. Co. and other parties therein named (reference being made thereto for the names of defendants) claiming
8 lands in Allen County, Kansas, under patent from the United States and mentioned and described in the Amended Bill filed in said case Dec. 8, 1887, and hereinafter mentioned.

Second. That for many years prior to the passage of the acts of Congress hereinafter mentioned, complainant was the owner and in the exclusive possession of all the lands mentioned in the original and amended Bills and hereinafter described; and that said lands had been surveyed and were public lands at the date of said acts and were subject to disposal by Congress and to the provisions of the Homestead and Pre-emption laws.

Third. That on the first of July, 1862, an act of Congress was approved which, among other things, provided for the incorporation of a railway to be known as the Union Pacific Rail Road Company, sections 3, 8 and 9 of which were incorporated in the Bill.

Also, that in 1864, the name of the Leavenworth and Pawnee and Western Rail Road Company was changed to that of the Union Pacific Railway Company Eastern Division, and that on July 2, 1864, said act of July 1, 1862, was amended as shown by Section 4 thereof, which was copied in said Bill.

Also, that on the 17th day of July, 1862, the Leavenworth, Pawnee & Western Railroad Company filed a map showing the general route of its road which extended along the Kansas River from its mouth to the Republican River at Ft. Riley, thence along the west bank of the latter to the 100 meridian.

Also, the Bill alleged and stated the substance of the special act of Congress of July 3, 1866, authorizing the Union Pacific Railway to file its map and other provisions of said act; also, of its compliance therewith and the withdrawal of lands along its route by order of the Secretary of the Interior.

Fourth. The Bill alleged the approval and set forth the act of Congress of March 3, 1863, granting lands to the State of Kansas to aid in the construction of a road from Leavenworth by way of Lawrence via the Ohio City crossing of the Osage River with the Branch road therein mentioned; also a road from the City of Atchison via Topeka to the western line of the State with the branch down the Neosho Valley, as provided in said act. The legislature of the State of Kansas on February 9, 1864, by act accepted said
9 grant and made the L. L. & F. & Gibson the beneficiary in the first mentioned road and branch and the Atchison, Topeka & Santa Fe Railroad the beneficiary of the second road and branch. That the name of the L. L. & F. & Gibson road was changed by the Kansas legislature February 24th to the L. L. & G. R. R. Co. and afterwards was changed to the K. C. L. & S. K. R. R. Co.

That on February 16th, 1864, the A. T. & S. F. R. R. Co. accepted said Kansas act of February 9, 1864, and that in 1864 the L. L. & Ft. Gibson R. R. Co. accepted said act and subsequently constructed to the southern boundary of the state, as required by said act of March 3, 1863; said Company failed to construct any road from Leavenworth to Lawrence and never became entitled to any indemnity lands to be selected by the Secretary of the Interior.

Fifth. The Bill alleged the approval of and set forth the act of Congress of July 26, 1866, granting lands to the State of Kansas to aid the Union Pacific Railroad company, Southern Branch, a corporation, organized under the laws of Kansas, to construct a road

from Ft. Riley down the Valley of the Neosho River to the southern line of the state. On December 6, 1866, said Company accepted said grant. On March 3, 1870, the name of the Union Pacific Southern Branch was changed to that of the Missouri, Kansas & Texas Railway Company. Said Company claims to have succeeded to all the rights and liabilities of the Union Pacific Railroad Company, Southern Branch, mentioned in said act approved July 26, 1866, but it never acquired any rights under any other act of Congress nor to any lands except such as it could lawfully receive under said act of 1866, if any.

Sixth. The Union Pacific Railroad Company, Southern Branch, under the terms of said act of July 26, 1866, constructed a road from near Ft. Riley to Parsons, Kansas, and no farther, and neither it nor said M. K. & T. Ry Co. ever did construct any other road by reason whereof neither of said companies ever became entitled to any indemnity lands to be selected or approved by the Secretary of the Interior.

But that as required by said act of July 26, 1866, the Union Pacific Railroad Company, Southern Branch, filed with the Secretary of the Interior a map of the location of its road from its northern terminus to the northern boundary of the Osage ceded lands near the southern boundary of Allen County, and on the 8th of January, 1868, said Company file- its map of definite location with the Secretary of the Interior from the north boundary of said Osage ceded lands to the south line of Kansas.

But said road was not constructed upon the line as marked on said map of definite location but was constructed through Allen County and other places at an average distance of nearly two miles therefrom. Said road was not constructed until July 13, 1870. Such deviation was fraudulently made so as to secure more and better lands than could have been secured if constructed upon the line as marked on said map, and by reason thereof, said company has received patents for large amounts of land it could not and would not otherwise have received.

The Secretary of the Interior, under a mistake of his lawful powers and under the belief that the M., K. & T. Ry. Co. and its predecessor had complied with the law, and by reason of false and fraudulent representation of said company, approved the selection of lands and caused them to be patented to said company as herein stated on the east side of the road of the L. L. & G. Railroad Company, and also other lands on the west side of said road.

Seventh. The Bill alleges the overlapping of the indemnity limits of the M., K. & T. Railroad and the L. L. & G. R. R. and attaches a map showing such overlap. Paragraphs 8, 9 and 10 of said amended Bill did not affect or relate to the lands in controversy. Paragraph 11 alleges that by falsely and fraudulently claiming it had constructed its road as required by said act of Congress approved July 26, 1866, and that it had constructed said Neosho railroad under said act of March 3, 1863, and assigned from the Atchison, Topeka & Santa Fe Railroad Company and that it was entitled to select as indemnity lands lying outside of the ten mile granted

limits of the road of the L. L. & G. R. R. Co., but within the twenty mile limits, said Secretary, misled by and believing such representations and by mistake of fact, permitted said M., K. & T. Ry. Co. to select such odd numbered sections as indemnity and he approved selections thereof outside the ten mile limits but within the ten mile limits of said road; and they were thereafter and under the
11 same mistake and error of fact and law, to said company,

But that as required by said act of July 26, 1866, the Union Pacific Railroad Company, Southern Branch, filed with the Secretary of the Interior a map of the location of its road from its northern terminus to the northern boundary of the Osage ceded lands near the southern boundary of Allen County, and on the 8th of January, 1868, said Company file- its map of definite location with the Secretary of the Interior from the north boundary of said Osage ceded lands to the south line of Kansas.

But said road was not constructed upon the line as marked on said map of definite location but was constructed through Allen County and other places at an average distance of nearly two miles therefrom. Said road was not constructed until July 13, 1870. Such deviation was fraudulently made so as to secure more and better lands than could have been secured if constructed upon the line as marked on said map, and by reason thereof, said company has received patents for large amounts of lands it could not and would not otherwise have received.

The Secretary of the Interior, under a mistake of his lawful powers and under the belief that the M., K. & T. Ry. Co. and its predecessor had complied with the law, and by reason of false and fraudulent representation of said company, approved the selection of lands and caused them to be patented to said company as herein stated on the east side of the road of the L. L. & G. Railroad Company, and also other lands on the west side of said road.

Seventh. The Bill alleges the overlapping of the indemnity limits of the M., K. & T. Railroad and the L. L. & G. R. R. and attaches a map showing such overlap. Paragraphs 8, 9 and 10 of said amended Bill did not affect or relate to the lands in controversy. Paragraph 11 alleges that by falsely and fraudulently claiming it had constructed its road as required by said act of Congress approved July 26, 1866, and that it had constructed said Neosho railroad under said act of March 3, 1863, and assigned from the Atchison, Topeka & Santa Fe Railroad Company and that it was entitled to select as indemnity lands lying outside of the ten mile granted limits of the road of the L. L. & G. R. R. Co., but within the twenty mile
12 limits, said Secretary, misled by and believing such representations and by mistake of fact, permitted said M., K. & T. Ry. Co. to select such odd numbered sections as indemnity and he approved selections thereof outside the ten mile limits but within the ten mile limits of said road; and they were thereafter, under the same mistake and error of fact and law, — to said company, when in fact they were not subject to such indemnity but were reserved to the United States as and for indemnity for the L. L. & G. R. R. Co.

Said selections were approved by the Secretary and patents therefor issued to said company on the 19th day of May, 1873, by the Governor of Kansas unlawfully claiming to do so under said act of March 3, 1863.

Twelfth. That prior to July 26, 1866, and prior to the filing of the map of definite location and prior to the selection of said lands by said company or the approval thereof by the Secretary of the Interior, and prior to any grant thereof or any contract of sale by the M., K. & T. Ry. Co. a large number of actual and *bona fide* settlers over the age of twenty-one and citizens of the United States, each having all the qualifications required by the Homestead and pre-emption laws of the United States, claimed the right under said laws to take the necessary steps and do the acts requisite to obtain title under said laws respectively to said lands; and that such persons, prior to such filing of said map and prior to such selection, did enter upon, occupy and improve as required by said laws the said lands. And that such persons have ever since been and still are entitled to receive patents therefor and are yet ready and willing to do whatever may be lawfully required of them.

Also, that said original settlers were unlawfully and without right refused the right to homestead and pre-empt said lands, and that said lands were unlawfully and without right withdrawn from the public lands of the United States by direction of the Secretary of the Interior and Commissioner of the general land office under a mistaken belief in the law long prior to their selection by the M., K. & T. Ry. Co.

The following is a list of such persons and claiming parts of odd numbered sections in indemnity limits of the L. L. & G. R. R. Co. and under the indemnity limits of the Missouri, Kansas &
13 Texas Railway Company in Allen County on the east side of the line of the L. L. & G. R. R. and whose rights accrued as aforesaid with the date thereof prior to selection for the railroad company, and with the name of the claimant under the railway company, which list among others contains the following: "Name of claimant under Homestead or Pre-emption settlement, N. L. Ard; Description of land and date of first occupancy by Homestead or Pre-emption claimant, N. ½ of N. E. ¼ of S. W. ¼ of Section 11, Township 26, Range 20, March, 1872; Name of claimant under the Railway Company, Alexander Branden." None of said persons named in the several foregoing lists ever voluntarily abandoned said originally so made or attempted to be made, and all said persons have all the qualificatians and have performed and are ready to do all acts required by the act of Congress of March 3, 1887, for the adjustment of land grants, etc., to entitle them to the remedies therein provided.

Thirteenth. Does not relate to the land in controversy.

Fourteenth. Sundry suits are pending in the Supreme Court of the United States and in the Supreme Court of the State of Kansas in which some of the defendants herein, by actions commenced since the pendency of the bill in equity in this case, seek as plaintiffs to recover of settlers in Allen County, Kansas, lands to which said set-

tlers are entitled as alleged in this bill and said parties seeking to recover claim title under the patents hereinbefore mentioned to said M., K. & T. Ry. Co.

And your orator says that having all the qualifications as aforesaid, on the 14th day of July, 1866, said Newton L. Ard also made settlement on the north half of the northeast quarter of Section 11, in Town 26, of Range 20, east, containing 80 acres, in said Allen County, adjoining said southeast quarter of Section 2, in Town 20, Range 20, east; and did all acts required to procure title thereto as one of the settlers, as alleged in this bill. But the officers of the local land office at Humboldt having jurisdiction as to said lands then and afterwards always unlawfully refused to permit said Ard to make proof of his settlement on any of said lands or payment therefor, on the mistaken ground that said lands were within the ten-mile granted limits of the Leavenworth, Lawrence & Galveston road, and had been withdrawn from entry by the Commissioner of the General Land Office and so were marked on the official map of said lands. But said Ard then took and kept possession and has
14 ever since so remained in possession for the purpose of perfecting his right to a homestead or pre-emption entry, and so remains in possession.

Your orator alleges that said officers acted under a mistake of fact and of law in so refusing. Said lands were not within said granted limits. And under this mistake and others alleged, said lands were patented as indemnity lands as aforesaid to the Missouri, Kansas & Texas Railway Company.

And Alexander Brandon, one of the defendants in this case, now claims said land under said railway company, and notwithstanding the pendency of this suit, said Brandon, after this suit was commenced, commenced and prosecuted an action against said Ard to recover said lands, which is now pending in the Supreme Court of the United States on appeal from the Supreme Court of the State of Kansas.

And your orator avers that said patent to said railway company is void for the reasons alleged, and because said lands were reserved as indemnity lands for the Leavenworth, Lawrence & Galveston Railroad Company, as elsewhere shown in this bill.

The other portions of said amended bill were immaterial so far as the errors alleged herein are concerned. The prayer of said bill was as follows:

1. That the patents issued to the Missouri, Kansas & Texas Railway Company for even numbered sections of land within the ten-mile granted limits of the road of the Leavenworth, Lawrence & Galveston Railroad Company on the east side thereof, be vacated, cancelled and declared null and void. (141 Sup. Court U. S. Reports, 358, 371.)

II. That the patents issued to said railway company for odd numbered sections of land outside of the ten-mile limits but within the twenty-mile indemnity limits of the road of the Missouri, Kansas & Texas Railway Company, and of the road of the Leavenworth, Lawrence & Galveston Railroad Company, on the east side thereof, be

vacated, canceled and declared null and void. (141 Sup. Court U. S. R., 372.)

III. That for the same reasons the patents issued to the Missouri, Kansas & Texas Railway Company for even numbered sections of land within the ten-mile limits of the road of the Leavenworth, Lawrence & Galveston Railroad Company on the west side
15 thereof, and the patents issued to the Missouri, Kansas & Texas Railway Company for odd numbered sections on the west side of the road of the Leavenworth, Lawrence & Galveston Railroad Company, within the twenty-mile indemnity limits of said two roads, be vacated, canceled and declared void.

IV. That the patents issued to the Missouri, Kansas & Texas Railway Company for lands in both even numbered and odd numbered sections of lands, and on both sides of said road, whether within the ten-mile granted limits or outside thereof, and within the twenty-mile limits of either and of both of said roads on which homestead or preemption entries had been made or attempted to be made on or prior to July 26, 1866, and all so made or attempted then or thereafter, but prior to the selection and approval of any of said lands as indemnity lands for said Missouri, Kansas & Texas Railway Company, be vacated, canceled and declared void. (141 Sup. Court U. S. R. 374, 377, 380.)

V. And your orator prays that as to all lands unlawfully withheld from preemption and homestead settlement, and as to all lands from which occupants have been evicted by judicial process, it may be adjudged and decreed that said settlers and occupants respectively originally entitled to such lands, or those claiming under them, shall be ascertained, and that they be reinstated in their respective rights and possession of said land, and allowed to perfect their respective entries and titles as authorized by section three of the act of Congress approved March 3, 1887, to provide for the adjustment of land grants, etc. (24 U. S. Stat., 557), and as otherwise authorized by law.

VI. And your orator prays that its right to recover from the Missouri, Kansas & Texas Railway Company an amount of money equal to the government price of all the lands unlawfully selected and approved to it as indemnity lands, and of all lands unlawfully patented to it, may be affirmed and saved to it as required by the act of Congress approved March 3, 1887, being "An act to provide for the adjustment of land grants, made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes." (24 Stat. 556).

VII. That the patents for all lands selected or approved as indemnity lands for the Missouri, Kansas & Texas Railway Company, and granted to said company by patents, be vacated, canceled and
16 declared null and void.

VIII. That the patents issued to the Missouri, Kansas & Texas Railway Company for lands in both even and odd numbered sections, and on both sides of said road the ten-mile granted limits, on which homestead or pre-emption entries had been made, or attempted to be made, and upon which there were then and there sub-

sisting homesteads or pre-emption entries at the date of filing of the map of definite location as herein set forth, be vacated, canceled and declared void.

IX. That the patents issued to the Missouri, Kansas & Texas Railway Company for lands in both even and odd numbered sections of land, and on both sides of said road, within the indemnity limits of said road, on which homestead or pre-emption entries had been made, or attempted to be made, prior to the selection and approval of any of said lands as indemnity lands for said Missouri, Kansas and Texas Railway Company, and upon which said lands there were then and there subsisting homestead or preemption entries, be vacated, canceled and declared null and void.

X. That the patents for all lands selected or approved for indemnity lands or otherwise under any act of Congress for the Missouri, Kansas and Texas Railway Company within the granted limits of the acts of Congress of July 1st, 1862, and July 2d, 1864, as hereinbefore set forth, be vacated, canceled and declared null and void.

XI. That the patents for all lands selected or approved for the Missouri, Kansas and Texas Railway Company within the granted limits of the Atchison, Topeka and Santa Fe Railroad Company be vacated, canceled and declared null and void.

And that it be adjudged and decreed that the legal title to all said lands hereinbefore in this bill mentioned be and is vested in and of right belongs to your orator, and that the patents, copies of which are filed herewith in this case, and others in this bill mentioned or referred to, be vacated, canceled and declared null and void, and the Missouri, Kansas & Texas Railway Company be required to bring said original patents, and all patents issued to it for any and all of the lands mentioned in this third amended bill, into this honorable court, to be there delivered for cancellation; and that this Honorable Court will adjudge and decree that the said
17 patents, and all deeds, mortgages, conveyances and contracts of sale, of whatever character, executed by said Missouri, Kansas & Texas Railway Company to its co-defendants herein, or to other parties, be declared void, and to be considered a cloud on the legal title of your orator to said lands, and that said cloud be removed; and that this Honorable Court will further adjudge and decree that each of the several defendants named in this amended bill of complaint together with said Missouri, Kansas & Texas Railway Company, are each and all, severally, without color, claim or title to said lands and every part thereof; and that they and each and all of them, and said Missouri, Kansas & Texas Railway Company be, severally and collectively, perpetually enjoined and restrained from setting up any claim or title, or right, either in law or equity, in or to any of said lands mentioned in this amended bill of complaint; and that your orator may have such other, further and different relief in the premises as the nature of the case may require, or as to equity and to this Honorable Court may seem meet and fit.

The plaintiff also introduced in evidence the Answer of the Missouri, Kansas & Texas Railway Company filed in said cause, in

which answer said company set forth the facts relied on by it to entitle it to receive the patents sought to be canceled and alleged itself and the parties to whom it had conveyed said lands to be the owners thereof and denied all allegations of facts set forth in the bill as the grounds for the cancellation of said patents and fully placed in issue every fact set forth in the bill in any manner relating to the rights of N. L. Ard with respect to the land in controversy.

Among other allegations in said answer were the following:

Forty-second. And this defendant denies each and every allegation contained in the twelfth paragraph of the bill of complaint herein, and the several schedules or lists thereto annexed, and the correctness thereof, except that the lands in question were, by the direction of the Secretary of the Interior and Commissioners of the General Land Office withdrawn from sale, entry and settlement, and that such withdrawal was rightfully made.

Forty-seventh. Further answering the fourteenth paragraph of complainant's bill of complaint, this defendant denies that Newton L. Ard made lawful settlement upon the land in said para-
18 graph specifically described on the 14th day of July, 1866, or at any other time, and denies that the said Newton L. Ard did all acts required to procure title thereto, but on the contrary this defendant avers that said Newton L. Ard at the time of his alleged settlement and at any and all times prior to the withdrawal of said lands from sale and settlement for the purposes of the grants made to and for this defendant, wholly failed to do and perform the acts required by law to initiate, record or perfect any claim under the settlement laws of the United States, as then existing, by reason of which failure the officers of the Land Department of the United States refused to recognize the validity of the claim of said Newton L. Ard, and upon the showing of fact made by said Ard, held and decided that the claim and right of this defendant was paramount to that of the said Ard, and that said Ard was not a lawful settler upon the lands claimed by him prior to its withdrawal for the defendant's grants. And this defendant further avers that in the suits described in this paragraph of the complainant's bill of complaint, as brought by Charles H. Pratt and Alexander Brandon, as grantees of and holders of the railroad title to said land, against the said Ard to recover possession thereof, the said Ard therein set up all facts showing or tending to show his prior rights and equities as against the holders of the legal title under the railroad patent as by the law of Kansas and the practice of the courts of that state he was fully authorized to do, and that upon such full showing of his alleged prior rights the Supreme Court of the State of Kansas held and decided that said Ard had neither lawful or equitable right to said land superior to the lawful title of said Pratt derived from and under the grant to and for this defendant and the patent issued to this defendant thereunder for said land, and said Court gave judgment accordingly. That each of said causes is now pending before the Supreme Court of the United States upon writ of error sued out by said Ard. And this defendant says that said actions now pending are in law a complete defense and bar to the

right of the complainant in this suit to have or demand any relief therein whatsoever by reason of the alleged claim of said Ard or otherwise, and that the patent issued to this defendant for said land was lawfully and properly issued, and is not now open to
19 further attack in this suit.

The plaintiff also introduced the testimony of N. L. Ard in the said case of the United States *vs.* Missouri, Kansas & Texas Railway Company *vs.* Alex Brandon *et al.*, which is as follows:

N. L. ARD, a witness called by complainant in support of the claim of himself, being first duly sworn, testified as follows:

Questions by CRAIN:

Q. State your name, age and residence?

A. Newton L. Ard, Allen County, Kas.; over 49; Elsmore, Allen County, postoffice address.

Q. Are you an American born citizen?

A. Yes sir.

Q. Describe any land in Allen County which you may claim under the homestead laws?

A. West half southeast quarter section 2 and the north half northeast quarter section 11, all in township 26, range 26.

Q. When did you first know that land?

A. Ever since 1861.

Q. What time in the year 1861?

A. May 1861.

Q. Who was the first settler on that land?

A. I was.

Q. When did you first settle on it?

A. I began to improve it in June, 1866.

Q. Then did you move your family on and keep on improving the farm from that time on?

A. I kept on improving the farm from that time on and farmed it ever since.

Q. Been in possession of it all the time?

A. Yes sir.

Q. Did anybody dispute your possession?

A. Yes sir, after a good many years.

Q. How many years before your possession was disputed?

A. There was no action brought against me to dispute my right until in 1886, I think.

Q. Just twenty years after you settled on the Land?

A. Yes sir.

Q. Who brought that action?

A. C. H. Pratt for one piece of land.

Q. And who brought it on the other?

A. He brought it on the west half of the southeast of section 2, and Alexander Brandon on the north half of the northeast quarter of section 11.

Q. Did they bring these suits about the same time?

A. One was brought in 1886 and the other in the spring of 1887.

Q. They were both ejectment suits?

A. Yes sir.

Q. And you had a trial in the district court of Allen County?

A. Yes sir.

Q. And then you appealed to the Supreme Court of the state?

A. Yes sir.

Q. And from there to the Supreme court of the United States and they are pending there now both of them?

A. Yes, sir.

Q. Did you ever attempt to file on this land?

A. Yes, sir.

Q. When was the first time?

A. In July 14, 1866, I attempted to file on both pieces at the same time.

Q. What did you do and where did you go to have your papers prepared?

A. Sent to Humboldt.

Q. Was the land office at Humboldt then?

A. Yes, sir.

Q. And you went to the land office?

A. Yes, sir.

Q. What did you do?

A. I made out papers, my brother and I, James Ard.

Q. Did you make out a homestead application, and did you sign that?

A. Yes, sir.

Q. And a homestead affidavit, and you signed and swore to that?

A. Yes, sir.

Q. Who did you swear to it before?

A. Before the Register of the Land Office, Watson Stewart.

Q. Did you have the necessary $14 there to pay?.

A. Yes, sir.

Q. Did you tender the papers and the money?

A. Yes, sir.

Q. What did the Register say to that? Did he accept it?

A. No sir, he said that the land was within the granted limits.

Q. Of what road?

A. Of the L. L. & G. and was double minimum in price and that he could only accept a homestead application for eight- acres; that a man was only entitled to take a homestead of eighty acres.

21 Q. What did you say to that?

A. I told him that I wanted the whole quarter and he said that he could not accept it.

Q. So that was all that was done?

A. Of course he then advised me. He said that he thought there would be a time when the road was located that it would fall on the outside of the granted limits, and that I could get 160 acres.

Q. And when the road was finally located you did fall on the outside?

A. Yes sir.

Q. But still for some reason the railroad still claimed it as being within the indemnity limits?

A. Yes, sir.

Q. And being one of the pieces that was selected by the company afterwards?

A. Yes, sir.

Q. Do you know when that land was selected?

A. It was selected I think, in 1872.

Q. And you had been living there then for six years anyhow when this land was selected by the railroad people as indemnity land?

A. I had not been, of course, residing on the land with my family until 1871.

Q. You had been in possession of the land?

A. Yes, sir, and improving it and using it.

Q. And you were in the actual and notorious possession of it there when the railroad made the selection of the land?

A. Yes, sir.

Q. Had eighty acres fenced?

A. Yes, sir, more than that, and about 75 acres broke out at that time.

Q. Who was the receiver or register of the land office at that time?

A. Watson Stewart was Register of the Land Office.

Q. At the time the selection was made?

A. No sir, at the time of the selection he was not. I think it was a man by the name of Goss.

Q. What official position did he occupy in the M. K. & T.?

A. He was President of the company.

Q. And he was president of the M. K. & T. company at the same time that he was Register of the land office?

A. Yes, sir.

Q. He was President of the branch?

22 A. Yes, sir, the Union Pacific, Southern Branch; he was president of that branch.

Q. Do you remember when this party that was selecting or appraising lands the indemnity lands of the M. K. & T. Company, or L. L. & G. Company in 1872 to 1876, when they were out selecting and appraising lands, who was the head of that?

A. Captain Hurd and W. H. Andrews, I believe were the men. They were appraising the lands.

Q. This Captain Hurd knew you, did he?

A. Yes sir.

Q. Had he ever been to your house?

A. He was to my house during the time he was making selections and appraising the lands.

Q. He knew you was claiming that land under the homestead laws of the United States?

A. Yes sir. I told him I was.

Q. Did he say anything about whether he was going to appraise that land and select it anyhow?

A. He didn't say much.

Q. Did he say he was going to appraise it?
A. Yes, sir.
Q. Did you tell him not to do it?
A. I told him I was going to homestead it.
Q. You say these two suits are still pending in the United States supreme court?
A. Yes, sir.
Q. Who was your attorney in the U. S. Supreme court?
A. I had a man, B. W. Perkins; he is now dead.
Q. You have not any one representing you at the present time?
A. No sir.
Q. You are trying to make some arrangement with Mr. Sedgwick to continue the cases until after this case is decided?
A. Yes sir.
Q. Did you ever attempt to file on this land more than once?
A. Yes, sir.
Q. When did you try again after this attempt in 1866?
A. I think it was that I made out papers about 1871 the next attempt to file.
Q. Where did you go then?
A. I went to the land office. Whether it was at Neodesha or Independence, I am not positive.
Q. You went again to the land office?
A. Yes sir.
23 Q. Went there with your money and had your papers prepared, affidavit and application, and took your witnesses?
A. Yes sir, but I don't think I had any witnesses.
Q. Did you have witnesses the first time?
A. Yes, sir.
Q. What success did you meet with at Neodesha?
A. He rejected them and said the lands had been withdrawn and that it was railroad land.
Q. Who was in the land office then?
A. I don't remember who was in the land office at that time.
Q. This M. K. & T. man?
A. I think it was some other man.
Q. Did you ever make any other attempt to file?
A. Yes sir.
Q. When was that?
A. In the spring of 1872, along in March or February.
Q. Each attempt was to homestead?
A. Yes sir.
Q. What did you do at that time?
A. I made out papers and tendered the fees.
Q. Where did you go this time?
A. To Independence this time.
Q. Did you have your witnesses then?
A. Yes sir, I had witnesses there and offered money, but they would not accept.
Q. Did you ever make any other effort?

A. I made effort at several different times since, but I could not tell you?

Q. Several different times?

A. Yes sir.

Q. And each time you were ready with your evidence and your money to pay the homestead fees?

A. Yes sir.

Q. And each time you met with the same refusal?

A. Yes sir.

Q. And on the same grounds?

A. Yes sir.

Q. Have you got any papers in your possession in regard to any of these filings?

A. All the papers I had I had at the time first attempted to file. I made out a notice of pre-emption. They would not allow me to homestead, and of course, I wanted to give some notice that I had, to keep anyone else from taking the claim.

Q. You have got that old paper yet, have you?

A. I think I have got it I am not sure. (Witness produces paper.)

24 Q. Is this the old pre-emption filing that you referred to?

A. It is the preëmption filing that I made at that time.

Q. You made this pre-emption filing, or offered it rather, because they would not let you file homestead papers?

A. Yes, sir.

Q. You wanted to give the world notice that you were claiming that land?

A. Yes, sir.

Q. What you wanted to do was to homestead the land and not pre-empt it?

A. Yes, sir.

(CRAIN:) It is number 2115, Register office, Humboldt, Kansas, July 14, 1866, I certify that Newton Ard has this day filed in this office, his notice to claim by right of pre-emption the west half of the southeast quarter of section 2, township 26, range 26, east of the 6th principal meridian, in the state of Kansas, Watson Stewart, Register." Marked in red ink across the face of the certificate is the following: "$2.50 per acre; within railroad limit."

Q. Who wrote that on there?

A. The Register, Watson Stewart.

MASTER:

Q. What did he mean by that? That you could pre-empt by paying that price?

A. Yes sir, I presume so.

(CRAIN:)

Q. You didn't intend to pay $2.50 an acre and you didn't intend really to pre-empt the land?

A. No, sir.

Q. You simply took out that pre-emption filing in order to show that you had possession of the land?

A. Yes sir.

Q. To make a sort of record of your title?

A. Yes sir.

Q. At the time you settled on this land and at these times you filed on the land was you the owner of any other real estate?

A. No sir.

Q. Did you intend to make a *bona fide* homestead settlement on the land?

A. Yes sir.

Q. And you are now ready and willing to comply with the conditions of the homestead law in order to perfect your title to do so?

A. Yes sir.

Q. You never sold or disposed of your interest in that land?

A. No sir.

25 Q. You still claim it under the homestead laws of the United States?

A. Yes, sir.

Q. You are a native born citizen of the United States?

A. Yes, sir.

Q. And you were in the army?

A. Only in the militia, Kansas militia.

Q. Was your proposed settlement of this land in the interest of anyone than yourself?

A. No, sir.

Q. Have you ever attempted to homestead or pre-empt land prior to this attempt on this land, or since?

A. No, sir.

Q. You have stuck by these quarter sections since 1866?

A. Yes, sir.

Q. I don't understand why your homestead entry was refused, and upon what theory you made application to pre-empt this west half of the southeast quarter of section 2. I wish you would explain that again?

A. The reason that it was not made only on the one piece?

Q. Why, after your homestead entry was rejected on the west half of the southeast quarter did you apply to enter it under the pre-emption laws? What purpose did you have in view?

A. The purpose only was to give notice that I had a claim upon the land.

Q. Did the Register and Receiver seem to be willing to accept your pre-emption entry upon the payment of $2.50 an acre? They indicate to you that they would accept that kind of an entry?

A. Yes, sir.

Q. But you didn't have a desire to make such an entry?

A. No, sir.

Q. And you had an idea that if you would make this proposition to pre-empt that it would in some manner or other, give notice to the world that you would hold the claim of the land?

A. Yes, sir, and he also told me that I could change that any time into a homestead.

Q. Then this pre-emption entry was rejected because you didn't pay $2.50 an acre?

A. Yes, sir.

26 Cross-examination—SEDGWICK:

Q. Why were they willing to accept a pre-emption entry upon the land when they refused to accept your homestead entry because it was in the limits?

A. Because I wanted to get the whole quarter. The Register told me when the road was located that it would fall on the outside of the granted limits.

Q. Would not a homestead filing protect you just the same as the pre-emption filing?

A. I wanted the 160 acres.

Q. But the preëmption only protected you as to eighty acres, and you could have made a homestead just as well as you could a pre-emption filing?

A. Yes, sir.

Q. They did accept your pre-emption filing, didn't they, on the 14th day of July, 1886?

A. Yes, sir.

Q. Declaratory statement number 2116, signed Newton Ard, for the west half of the southeast quarter section 2, township 26, range 20?

A. Yes, sir.

Q. And that they did accept?

A. Yes, sir.

Q. But would not a homestead filing?

A. No, sir.

Q. That was the time they applied to make a homestead filing on the entire quarter and that they told you you could not do it, and you took a pre-emption on this land in section 2?

A. Yes, sir.

Q. Where were your improvements at that time.

A. On 2.

Q. What improvements did you have, if any, on 11?

A. Nothing more than a hedge row broken.

Q. They told you, then that you could either take a homestead or pre-emption filing on one of these pieces, but could not take more than eighty acres, because it was in the limits of the railroad grant?

A. Yes, sir.

Q. They didn't tell you it was a part of the grant?

A. No, sir.

Q. When did you next attempt to make a filing upon the land?

A. About 1871.

Q. Then you ran from July, 1866, until 1871? In other words, you permitted your declaratory statement to expire, and made no effort to make a homestead filing until 1871? That is true, is it not?

A. I went to the land office again about June, 1867.

27 Q. Didn't you by the terms of that declaratory statement agree to pay the sum of $2.50 an acre for the west half of southeast quarter of section 2 at the expiration of six months?

A. The Register informed me I had twelve months to pay for it; that is what he informed me.

Q. Did you go there within the 12th months and change this filing, or offer to do so?

A. Yes, sir, I did.

Q. When was that?

A. About June, 1867.

Q. Who was the officers of the land office at that time?

A. Goss was the register.

Q. In June, 1867, N. N. Goss was Register?

A. Yes, sir.

Q. Who else was connected with the land office?

A. I am not so sure, but I think it was Dave Emert——

Q. Where did he live?

A. He lived at Humboldt.

Q. What part of the state was he from?

A. He was in the office, but I am not sure whether he was Receiver.

Q. Where did you understand he was from?

A. He lived at Humboldt.

Q. And what answer did they make to you then in June, 1867?

A. They claimed that the lands had been withdrawn and that I could not change my pre-emption into a homestead.

Q. Did you call the officers' attention specifically to this pre-emption declaratory statement?

A. Yes, sir.

Q. What answer did he make to that?

A. He said that the land had been withdrawn, and, of course, if the pre-emption filing was withdrawn it would go to the railroad.

Q. Did you take legal advice on that question?

A. Only his advice.

Q. That was in June, 1867?

A. Yes, sir.

Q. Your improvements were on section 2?

A. Yes, sir, partially; yes, sir.

Q. You have it improved now, have you not?

A. Nothing more than fenced and pasture. I use it for hay land. There is forty acres enclosed in a pasture and the other is hay land.

Q. When did you next go to the land office?

A. I think it was in 1871, I believe.

Q. Where was the land office located at that time?

28 A. I think it was Neodesha or Independence I am not certain.

Q. Was the land office ever at Neodesha?

A. I think it was there awhile.

Q. Was it not removed from Humboldt to Independence?

A. I don't remember.

Q. You think you went to Neodesha?
A. I am not positive; I went to the land office, but I am not positive.
Q. Do you remember who was Register and Receiver?
A. No, sir, I do not.
Q. Do you know Maxson, P. B. Maxson?
A. I got partially acquainted with him, that is all.
Q. What answer did they make to you then?
A. They said the lands had been withdrawn.
Q. Did you appeal from the decision of 1867?
A. No, sir.
Q. Did you appeal from the decision of the land office in 1871?
A. No, sir.
Q. When did you next go to the land office?
A. It was in the spring of 1872.
Q. Where was the land office at that time?
A. At Independence.
Q. Do you remember who was the officers then?
A. It was Maxson, I think.
Q. What answer did he make to you?
A. He said the same; that the land had been withdrawn.
Q. Did you appeal from that decision?
A. No, sir.
Q. When did you next go to the land office?
A. I next went to the land office that fall; some time in the fall of 1872.
Q. Still at Independence?
A. Yes, sir.
Q. And what answer did you receive at that time?
A. I went there. Of course I was advised to bring proof at that time to see if I could not homestead the land.
Q. You didn't take any proof in June, 1867 or 1871?
A. No, sir.
Q. Did you make out an application or affidavit or tender any money?
A. In 1871 I did, but I had no witnesses.
Q. What did you do?
A. I made out papers and tendered money; I didn't have witnesses.
29 Q. You didn't do that in June, 1867?
A. No, sir.
Q. What did you do in 1872 at Independence?
A. I made out papers and tendered money and had witnesses.
Q. What was the decision of the office on that occasion?
A. He said the land had been withdrawn.
Q. Did you appeal from that decision?
A. No, sir.
Q. When did you next attempt to prove up?
A. The next was in September in the same year, 1872.
Q. What did you do then?
A. I had taken some witnesses and had a hearing before the office.

Q. Was anyone contesting or opposed to your application?
A. Yes, sir.
Q. Who was?
A. The M. K. & T. Ry. Co.
Q. What was the decision of the office on that occasion?
A. They rejected the hearing.
Q. Did you appeal?
A. Yes, sir.
Q. To who?
A. To the Commissioner.
Q. What was the result of the Commissioners investigation of the matter?
A. It was agin me.
Q. Did you appeal from his decision?
A. Yes, sir.
Q. To the Secretary of the Interior?
A. Yes, sir.
Q. What was the result?
A. His decision was that the land had been patented and that he could not allow it.
Q. That is just what I was getting at. The secretary decided that the land had been patented to the M. K. & T. R. R. Co. and that the land office has lost its jurisdiction? That was his decision, was it not?
A. Yes, sir.
Q. Do you remember when that land was patented to the M. K. & T. Ry. Co?
A. I think Nov., 1873.
Q. Now, when was this that you were before the land office with your proof and witnesses?
A. It was Sept., 1872.
Q. Then the land could not have been patented to the M. K. & T. if it was patented November, 1873?
A. It was not patented then when the hearing was at the land office. Before the hearing was before the Commissioner, it seemed that the papers didn't get before the Commissioners until the patent had passed.
Q. Your papers lay in the land office from 1872 until September 1873? When did the Secretary of the Interior render his decision on that appeal?
A. I think not until probably 1875. I don't remember exactly what year.
Q. Was it not early in 1874 that he rendered his decision?
A. It might have been. It has been so long.
Q. That was the first appeal that you had taken from the U. S. Land Office?
A. Yes sir.
Q. And the decision of both the commissioner and the Secretary of the Interior was against you?
A. Yes sir, because the land had been patented.
Q. When did you next go to the land office to make proof of your

homestead settlement and desire to make a filing there after that time?

A. I could not tell you. At different times, of course, I have been to the land office, but I could not give dates.

Q. Have you any papers? Have you the secretaries letter giving the decision in your case upon your first appeal?

A. I think I have got them at home.

Q. You have not got it here?

A. No sir.

Q. Will you bring that letter, tomorrow?

A. I can send them in.

Q. During all of that time you had continued to reside upon the west half of the southeast quarter of section 2?

A. Yes sir.

Q. And had this other land improved as you have indicated by a fence around it and a portion fenced for pasture and the balance hay land?

A. There is only forty acres enclosed in a fence, and the balance is open.

Q. In this appeal which you had taken and in the proof which you offered in support of your settlement was anything said in regard to your pre-emption filing on this west half of the southeast of section 2?

A. I don't remember what was said about it, no sir.

Q. Did you apply to have that commuted or changed to a homestead filing at any time?

A. No sir, I think not at that time.

Q. That had been cancelled by the land office had it not?

31 A. Not that I know of.

Q. When did you make an attempt to file on this land before the local land office after the first time?

A. In 1871.

Q. No sir, we have got up to 1873?

A. As I said, I cannot give you dates.

Q. Well go back to 1872; that is the time you made application before the local office and appealed from its decision. That was in 1872?

A. Yes sir.

Q. At that time did you file on the entire quarter or did you just make a filing of the west half of the southeast quarter of section 2?

A. In 1872 I made application for the full quarter.

Q. Didn't they reject your filing for the full quarter, and entertain an appeal for you as to the west half of the southeast of 2?

A. No sir, I didn't make a contest only for the one eighty that was filed on.

Q. The appeal involved only the eighty upon which you lived?

A. Yes sir.

Q. And you never had a contest before the land office at all since 1879 over the piece in 11?

A. No sir, I guess not.

Q. I will ask you if you didn't have that contest as late as 1891 before the Topeka office?

A. It might have been.

Q. Was I not there resisting it at Topeka?

A. Not that I know of.

Q. Do you know Morris Davis?

A. Not that I know of.

Q. Didn't Frank Herring claim this piece in 11 at one time?

A. No sir.

Q. And didn't you apply as late as 1891 before the Topeka office to be permitted to make a homestead upon the piece in section 11?

A. I think I made an application simply to reinstate my former one, to re-open the former application that I made first in 1866. That is since what is called the Anderson bill became a law. It was before the suit was tried on the odd sections; for the purpose of getting the Department to recommend a suit upon that particular piece; that was the purpose that I made that application.

32 Q. Now prior to 1879 the land office always rejected, and always refused to entertain any kind of a filing on any but one piece of that land, didn't they?

A. Yes sir.

Q. And they did not permit you to appeal for the west half of the southeast quarter of section 27?

A. Yes sir.

Q. Now, Mr. Ard, Mr. Pratt brought an action against you to put you off one of these pieces of land?

A. Yes sir.

Q. He recovered a judgment against you in Iola and you appealed it to the Supreme Court?

A. Yes sir.

Q. With the same result there, and now you have it in the U. S. Supreme Court?

A. Yes sir.

Q. Who brought the action as to the other piece?

A. Brandon.

Q. He brought it in the District Court?

A. Yes sir.

Q. He recovered Judgment?

A. Yes sir.

Q. The same result in the Supreme Court?

A. Yes sir.

Q. And now you have that before the Supreme Court of the United States?

A. Yes sir.

Q. You cannot be charged with having knowingly located on what you knew was railroad land at the time you went there, can you?

A. No sir, I think not.

MASTER:

Q. When you made your application they indicated they would be willing to let you make a filing of one eighty, but not for the whole 160?

A. Yes sir.

Q. And they also indicated in 1866, when you made application under the pre-emption laws, to let you take eighty under the pre-emption laws and not the whole 160?

A. Yes sir.

Q. When was it they first refused to let you take any of it under the homestead or preemption laws?

A. That was in 1867.

Q. When they indicated to you that you could not even take eighty acres under either one?

A. Yes sir.

Q. In 1867 they indicated that you could not have any?

A. Yes sir.

Q. What time?

A. In June 1867.

33 Q. And you persisted in making a filing in June, 1867, on the whole 160?

A. Yes sir, but didn't present any filing.

Q. You lived on that piece of land on section 2 and your most valuable improvements were there?

A. Yes sir.

Q. This land was selected by the M. K. & T. or the L. L. & G. in 1872?

A. Yes sir, that on 11 was selected August 1872 jointly by the companies.

Q. When was that on 2 selected?

A. I am not certain whether April 1872 or afterwards, I think it was afterwards.

Q. Did you make any application to homestead the whole 160 after the law of 1879, permitting you to homestead 160? Didn't Congress pass an act in 1879 permitting you to homestead 160?

A. Yes sir.

Q. That was on the outside of the place limits?

A. Yes sir.

Q. If I understood you coretly, in the first place they claimed this land was inside the place limits?

A. Yes sir.

Q. But when the road was finally located it fell on the outside of the place limits?

A. Yes sir.

Q. And after it was known it was outside of the place limits these officers insisted that you could not have 160 acres?

A. They claimed that I could not have any at all, but insisted that the whole thing was withdrawn.

Cross-examination—SEDGWICK:

Q. Why didn't you take an appeal from the decision of the Land Office refusing your application to make a filing?

A. Well, I didn't know as it would do me any good. I didn't think at that time—I didn't understand the law that it would be necessary to do so.

Redirect examination—CRAIN:

Q. Who did you say composed this committee on selecting and appraising indemnity lands?

A. Captain Hurd and Andrews.

Q. Were they a joint committee as you understood it?

A. I didn't understand whether they were or not.

Q. Do you know whether one represented the M. K. & T., and one the L. L. & G.

A. I don't know; they said they were appraisers on the
34 land.

MASTER:

Q. Did you state when you took your first appeal from the land office?

A. Yes sir, 1872.

Redirect examination—CRAIN:

Q. Now, Mr. Ard, do you know how many times you have applied to the local land office in this district to homestead that land?

A. No sir, I could not tell you.

Q. Have you an idea of how many times, an approximate idea?

A. As many as a half dozen times; not less than that.

Q. Did you ever apply at any time to have this pre-emption filing which you made in 1866 on the one eighty cancelled to be changed into a homestead filing?

A. Yes sir.

Q. When was that?

A. In June, 1867.

Q. And they refused to do that?

A. Yes sir.

Q. You have had quite a good deal of litigation over the title to this land?

A. Yes sir.

Q. Have you any idea, if so, state, the amount of money you have paid out in carrying on the litigation over the title to this land? Can you give an idea?

A. I have an idea?

A. $400 or $500, I didn't keep any account.

MASTER:

Q. The appeal you took in 1872 was the first appeal you took from the local land office, as I understand you?

A. Yes sir.

Q. At that time you make an application to homestead both of these eighties?

A. No sir, at that time I filed what was for a hearing for a contest over the eighty on section 2, I was informed by parties that by giving notice to other parties where I was filing on that you could have a hearing at the land office, and as I was on one, I filed only on one eighty, and that is the reason I didn't make it on the entire quarter.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the Testimony of
35 N. L. Ard taken before the Master Chas. Bucher in the suit of The United States of America *vs.* The Missouri, Kansas & Texas Railway Company, Case No. 5784, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 7th day of July A. D. 1904.

[SEAL.] (Signed) GEO. F. SHARRITT, *Clerk.*

The plaintiff also introduced in evidence the Report of The Master in said case of the United States *vs.* Missouri, Kansas & Texas Railway Company, Alex Brandon *et al.*, so far as relates to the land in controversy:

In the Circuit Court of the United States for the District of Kansas, First Division.

No. 5784.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY ET AL., Defendants.

Special Master's Report.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Kansas:

The undersigned Special Master in chancery, to whom the above cause was referred to ascertain the facts and report the same with findings and conclusions thereon, do respectfully report that I have proceeded to investigate the matter so referred to me and that after taking all the evidence and proofs produced and submitted by the respective parties to said suit, I find and report as follows:

With reference to the lands in controversy, specifically mentioned and pointed out in paragraph twelve of the Amended Bill, being lands to which, it is alleged the right of homestead and pre-emption in favor of certain persons therein named had attached, prior to July 26, 1866, and prior to the selection of said lands by the defendant company, or the approval thereof by the Secretary of the Interior, and prior to any grant or conveyance thereof to the company and prior to any sale or contract for sale thereof by
36 said company—I find as to each of said tracts, as follows:

W. ½ of S. E. ¼, Sec. 2, and N. ½ of N. E. ¼, Sec. 11, T. 26, R. 20.

(N. L. ARD-Hd. *Claimant.*)

These tracts of land are in Allen County, and both of them fall within the common or over-lapping indemnity limits of the grants to the L. L. & G. Railroad and the M. K. & T. Railway Company. The first named tract, in Section 2, was selected by the latter company as indemnity for lands lost in its place limits and the selection was approved by the Secretary of the Interior April 14, 1873, and thereafter patented to that Company by the United States Nov. 3, 1873, under the granting act of July 26, 1866. The last named tract, in Section 11, was selected as indemnity for lands lost in its place, by the M. K. & T. Railway Company and the L. L. & G. Railroad Company jointly, on August 8, 1872, and was approved to the State of Kansas for the M. K. & T. Railway Company, April 10, 1873, under the granting act of March 3, 1863, and thereafter patented to that company by the state on May 19, 1873.

Both of these tracts are included within the territory covered by the withdrawals from entry and settlement, dated respectively March 19, and April 30, 1867, hereinbefore set out in full.

Upon the passage of the granting act of March 3, 1863, and prior to the definite location of any of the roads or branches therein provided for, the senators and representatives in Congress from Kansas, requested the withdrawal of the lands, along the probable lines and routes of the railroads and branches named in that act, for the benefit of such grant. Thereupon, the Commissioner of the General Land Office, on March 19, 1863, forwarded to the local land officers, a diagram showing the probable lines of said roads and branches, with directions to withhold from sale or location and also from preemption and homestead entry, with the qualification therein indicated, all the odd sections within their respective districts, and lying within ten miles on either side of such probable lines. This order of withdrawal was approved by the Secretary of the Interior April 20, 1863, and was received by the Register and Receiver at the Humboldt office, on May 5, 1863, and by its terms became effective upon
37 such receipt. Said last mentioned tract of land, in Section 11, was embraced within and covered by said order of withdrawal, as being within what was supposed to be the ten mile limits of the L. L. & G. Railroad, and was withdrawn accordingly.

And afterwards, and on Nov. 28, 1866, when the definite location of the line of the L. L. & G. Railroad was fixed, it was found to be west of the said line of probable location, whereby, a portion of the lands covered by the withdrawal of 1863, proved to be within the indemnity limits of the grant to that road and not within its place limits as was supposed at the time of such withdrawal, and this land in Section 11, is one of such tracts.

The tracts in question contain 80 acres each, as so far as their relative location is concerned, they are so situated as to be subject to one homestead entry. N. L. Ard, the present homestead claimant, entered upon this land (160 acres) in June, 1866, with a view to acquiring title thereto, under the homestead act. After breaking up some of the prairie and making hedge rows on the land, he went to the local land office at Humboldt on July 14, 1866, and sought to make a homestead filing on the whole 160 acres. He tendered the

proper application and fees, all of which were rejected by the officer in charge. The Register of the land office informed him at the time, that his application could not be received for the reason, as he claimed, that the land was within the granted limits of the L. L. & G. Railroad, and was double minimum in price, and that he could accept a homestead application for 80 acres only. The Register also told Ard that he thought that when the line of the road was definitely located, this land would be found to be outside of the granted limits, and if so, he could then homestead 160 acres. From this action of the local officers, in refusing to permit him to enter more than 80 acres of this land under the homestead laws, Ard did not appeal. His application to so enter the whole 160 acres being thus refused, Mr. Ard, on the same day, filed with the Register a preemption declaratory statement, for the 80 acre tract in Section 2, and paid the required fee therefor. He did this, not with the intention to comply with the preemption laws or of endeavoring to acquire title to this tract thereunder, but with the view only to give notice that he had a claim upon the land, and thus mislead the land officers and others so that the claim would not be taken by anyone else, until the definite location of the line of the railroad should be fixed, when he hoped that these tracts would fall outside of the place limits,
38 as predicted by the Register, and that he would then finally be permitted to enter them both as a homestead. Mr. Ard didn't intend, when he filed this declaratory statement, to pay for the land therein described, and he had no intention to pre-empt it at all. His sole purpose from the start was to acquire title to all this land under the homestead laws, and not otherwise. Having filed his declaratory statement, and having thereby, as he supposed, given such notice, as would make his claim safe against the attempts of others to pre-empt, homestead or otherwise appropriate this tract, Mr. Ard returned to this land and continued to improve it as before.

It having been determined by the definite location of the line of the L. L. & G. Railroad in November of that year, that this land was outside of the ten mile or granted limits, Ard, in the June following, again went to the land office with the view of making homestead entry for both of these tracts; but he says he did not, as he expresses it, present any filing. He was then told by the officials in charge of the land office that these lands had been withdrawn for the benefit of the Railroad Companies. He called their attention to his pre-emption entry for the tract in Section 2, and offered to change it into a homestead, and he was informed by these officials that as this land had been withdrawn, if he now withdrew his pre-emption filing, the land would revert to the railroads. This is all that occurred between Mr. Ard and the officials on his visit to the land office in June, 1867, so far as I am able to determine from the evidence introduced before me. After this trip to the land office, Ard returned to the land, and continued to improve it and make it his home to the present time.

Sometime in the year 1871, Mr. Ard again visited the land office, and again applied to make homestead entry for the whole 160 acres, and this application was refused on the ground that the land had

been withdrawn and was not then open to homestead entry and settlement. Ard again appeared at the land office in the Spring of 1872, and again applied to make homestead entry for both these tracts, which resulted as did his attempt in 1871.

In the Summer or Fall of 1872, Ard again visited the land office, this time to prove up on the tract in Section 2, and make payment therefor under the pre-emption laws, and he made formal application for that purpose. This application was contested by the defendant railway company, and after a hearing, it was denied, for the reason and upon the grounds that Ard had failed to comply with the
39 requirements of the pre-emption laws. From this action and decision of the local officers in rejecting this application, Mr. Ard appealed to the Commissioner of the General Land Office, and from that officer to the Secretary of the Interior, by both of which officials the decision of the local officers was sustained.

When Ard entered upon these two tracts in June 1866, with the view to acquire title to the whole under the homestead laws, and when he went to the land office in July following and sought to make homestead entry therefor, the tract in Section 2, was open and subject to homestead or pre-emption entry, but the tract in Section 11, was not—for the reason that it had been withdrawn from such entry and settlement by the withdrawal order of March 19, 1863, and the Register of the Land Office was not permitted to receive an application to make homestead entry for lands covered by such withdrawal. Under these conditions, instead of making a homestead entry for the tract in Section 2, Ard saw fit to make the said pre-emption filing thereon, which he never followed up by a compliance with the pre-emption laws and had no intention to do so from the start.

At the time Ard went upon this land in June 1866, he was qualified to make a homestead or pre-emption entry and settlement, and has ever since remained competent to make homestead entry, and he is ready, willing, and able to comply with all the requirements of the homestead laws, if permitted, that he may acquire title to this land thereunder.

C. H. Pratt having become the owner of the tract in Section 2, and Alexander Brandon the owner of the tract in Section 11, under conveyances from the defendant Railway Company, they each commenced suit against Ard in the District Court of Allen County, Kansas, for the possession of their respective tracts. In these actions Pratt and Brandon each set up his title and right to possession thereunder. That Court was of general jurisdiction in law and equity, and had jurisdiction of the subject matter and the parties to the suit. Ard appeared in each of these actions and set up his right of possession to said tracts respectively, under the settlement laws of the United States. These cases were both tried by the court at the June term 1889, and the finding and judgment being in favor of Pratt and Brandon and against Ard, he removed both cases,
40 by petition in error, into the Supreme Court of the State for Review, by which court, the judgments of the District Court were affirmed, (43 Kan. 419-427) whereupon, Ard sued out a writ

of error from the Supreme Court of the United States, by which the judgments of the State Supreme Court were reversed and the causes remanded for further proceedings in accodance with the views by that court expressed in its opinion—See, Ard *v.* Brandon and Ard *v.* Pratt, 15 Sup. Ct. Rep. 406; 156 U. S. 537. These cases are therefor again pending in the District Court of Allen County, Kansas, for further trial.

It will be observed, from an examination of the record in these cases, that they were not tried and considered on a state of facts in all respects similar to the facts as they have been made to appear by the evidence produced before me. From these records it appears, for instance, that Ard filed his pre-emption declaratory statement for the tract in Section 2, upon the advice of the Register of the local land office; that he was persuaded by that official that by that course he could accomplish his desire to acquire the 150 acres of land which he had attempted but failed to enter as a homestead, and that such pre-emption entry was *bona fide* and in good faith; whereas, it appears from his own testimony before me that he filed this declaratory statement upon his own motion; that it was a mere scheme on his part to lull the public into the belief that he had a *bona fide* pre-emption claim, and to thereby secure the reservation of the tract from entry and settlement or appropriation by others until the definite location of the line of railroad, when he expected to be permitted to homestead both the tracts by a single entry. Again, it nowhere appears from the records in these ejectment suits, that the withdrawal of March 19, 1863, which included the tract in Section 11, was before any of the several courts through which these cases passed.

C. H. Pratt and Alexander Brandon, each purchased their respective tracts, took the conveyance, and paid a valuable consideration therefor in reliance on the validity of the patents thereto, and each of them are citizens of the United States.

Conclusion.—Ard's application to enter this 160 acres in July 1866, as one homestead, was rightfully refused by the Register for the reason that the one half of it lying in the odd section 11, was not then subject to such entry on account of its withdrawal by
41 the order of withdrawal of March 19, 1863. His pre-emption entry of the other half in the even section 2, was not made in good faith and was afterwards properly cancelled; and at the time those tracts were selected by the defendant Railway Company as indemnity for lands lost in its place limits, both tracts were free from any valid claim on his part, and were thereafter properly patented to the Railway Company.

Ard has no equitable rights in and to this land or any part of it, as against the Railway Company or its grantees, neither has the Government any cause of action against such company or its grantees to disturb the legal title conveyed by its patents to this land. * * *

All of which is respectively submitted.

C. BUCHER,
Special Master.

The plaintiff also introduced the final decree of the court in said cause, which decree is in words and figures as follows:—

In the Circuit Court of the United States for the District of Kansas, First Division.

UNITED STATES OF AMERICA, Complainant,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL., Defendants.

Decree.

This cause came on to be further heard at this term upon all that part of the third amended bill of complaint relating to lands situated in Allen County, State of Kansas, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the exceptions of the complainant to the report of the Master as to each of the tracts of land hereinafter specifically described are hereby sustained, and so much of the report of said Master as refers to each of said tracts of land is hereby set aside.

It is further ordered, adjudged and decreed that so much of the patent of the United States to the Missouri, Kansas & Texas Railway Company, dated the 3rd day of November, 1873, as conveyed to said railway company, the west half of the southeast quarter of Section 2, Township 26, Range 20, in Allen County, State of Kansas, and the deed by which said railway company conveyed said land to the defendant H. C. Pratt, dated the 6th day of June, 1889, are
42 each hereby cancelled, annulled and held for naught.

It is further ordered, adjudged and decreed that so much of the patent from the United States to the Missouri, Kansas & Texas Railway Company, dated the 3rd day of November, 1873, as conveyed to said railway company the Southeast quarter of Section 18, Township 26, Range 20, in Allen County, State of Kansas, and the deed dated the 31st day of August, 1870, by which said Railway Company conveyed said land to one George W. Gibson, and the subsequent conveyances by which the title was vested in the defendant P. S. Huffman, are each hereby canceled, set aside and held for naught.

It is further ordered, adjudged and decreed that all of the other exceptions of the complainant to those parts of the Master's report that refers to lands in said Allen County, State of Kansas, are overruled, and such portions of said report are hereby approved and confirmed, and the said third amended bill, as to all lands therein described situate in Allen County, State of Kansas, except those hereinbefore specifically described, is hereby dismissed, but without prejudice to the right of the United States, if any such right exists, to sue the defendant railway company for the value of any lands wrongfully or erroneously certified or patented to it.

And it is further ordered, adjudged and decreed that as to all such lands in Allen County, Kansas, (Except the two tracts above named)

the title of those claiming by and under the defendant, the Missouri, Kansas & Texas Railway Company, be and is hereby confirmed.

It is further ordered and adjudged that that portion of the costs of this suit relating to said two tracts of land above described, be and they are hereby taxed against the Missouri, Kansas & Texas Railway Company, defendant, that said company is not liable for the costs relating to the balance of lands described in said third amended bill, or any other lands affected by the proceedings in this cause. But the Court finds that the complainant is liable for all the costs in this cause, except that portion thereof relating to said two tracts of land.

And the complainant now in open court gives notice of its appeal from this decree, and from the former decree passed in this cause on the 25th day of August, 1900, which appeal is hereby allowed and granted, as prayed for, and the defendants, the Missouri, Kansas & Texas Railway Company and C. H. Pratt and P. S. Huffman,
43 claimants under the railway company of said two tracts of land, likewise now in open court give notice of appeal from this decree in so far as it pertains to said two tracts of land above mentioned, which appeal is hereby granted and allowed.

WILLIAM C. HOOK, *Judge*.

Also it was admitted as part of the evidence, "that the local land office of the district in which the lands in question are situated, on May 5, 1863, received from the General Land Office the letter which appears on pages 55, 56, 57 and 58 of the 27 Kansas reports, which letter is in words and figures as follows:

GENERAL LAND OFFICE, *March* 19, 1863.

Register and Receiver, Humboldt, Kansas.

GENTLEMEN: The act of congress approved March 3, 1863, makes a grant of alternate sections of land to Kansas, to aid in the construction, "first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage river, to the southern line of the state," "with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fe railroad where said road intersects the Neosho river; second, from Atchison, via Topeka, to the western line of the state, in the direction of Fort Union," etc., "with a branch from where this last named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley."

This law concedes "every alternate section of land, designated by odd numbers, for ten sections in width, on each side of said roads and each of its branches."

The first section further provides that, where lands thus granted have been sold, reserved, or otherwise appropriated, or the rights of preëmption or homestead settlements have attached, other lands, designated by odd numbers, in no case to be located further than twenty miles from the lines of said roads and branches, shall be selected by direction of the secretary of the interior, &c.

44 The second section requires the reserve (even) section within the ten-mile limits to be sold at not less than double the minimum price of the public lands. No such section can, however, be sold at private entry until after it shall have been first offered at or above the increased minimum price: "Provided, that actual and *bona fide* settlers under the provisions of the preëmption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation and occupation as now provided by law, purchase the same at the increased minimum price aforesaid; And provided, also, That settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy and cultivate the same for *a period of five* years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding."

The senators and representatives in congress from Kansas have requested the withdrawal of the lands along the lines or routes of the railroads and branches provided for in this act. I inclose a diagram showing the probable lines of said roads and branches, with the ten-mile limits on each side, (colored green;) and you are hereby directed to withhold from ordinary private sale or location, and also from preëmption and homestead, *with the qualification hereinafter indicated*, all the public lands in your district and lying within the ten-mile limits are designated in said diagram. Where said lines pass through the surveyed lands, the register will proceed at once to lay down, in lead pencil, on the township plat, the ten-mile limits of the reserve, on each side thereof, and make the proper notes thereon showing that the lands embraced within said limits are reserved from sale or entry. And as the surveys progress and the township plats are received, he will proceed in like manner to lay down the limits of the reservation and make similar notes, and immediately report the same to this office, so that this order may be strictly observed by withholding the lands in said limits. In virtue, however, of the laws of 1853, and 1854, interests of two classes of settlers are provided for and protected, to wit:

1st. By the said act of March 27, 1854, (vol. 10, p. 269) preëmptors either upon the odd or even sections, who had actually settled before the receipt at your office of this order of withdrawal, have the right, upon establishing their claims according to law, to pay
45 for them at $1.25 per acre, or in virtue of the act of March 22, 1852, to locate the same with warrants.

2d. In accordance with the said act of March 3, 1853, (vol. 10, p. 244,) any preëmptor who, *subsequent* to the receipt as aforesaid, of the order of withdrawal, and *prior* to the final allotment of the alternate sections, to the railroad, may settle upon and improve the even-numbered (not odd) sections, and who shall establish their preëmptions according to law, have a right to do so before the same are offered at public sale, rating the land at $2.50 per acre, with the right to pay for the same in cash, or as stipulated in the last proviso to the first section of the act of March 22, 1852, (vol. 10, p. 3,) to pay part in warrants at $1.25, and the residue in cash.

I would also call your attention to the first section of the homestead act, wherein it is provided "that any person" &c. &c., "shall" be entitled to enter one quarter-section or a less quantity of unappropriated public land, upon which said person may have filed a preëmption claim, or which may at the time the application is made, be subject to preëmption at $1.25 or less per acre, or eighty acres, or less, of such unappropriated lands at $2.50 per acre, &c.

You will, therefore, understand from the foregoing:

1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, preëmption, or homestead entry, except so far as inceptive rights may have accrued prior to the receipt by you of this order.

2d. That under the provisions of the acts of 1853 and 1862 the even sections will only be subject to preëmption at $2.50 per acre from that date, and dealt with at that ratability under the homestead.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

It was further admitted that the land in controversy is a part of the lands lying within the ten-mile limits as marked on the diagram mentioned in said letter of March 19, 1863, but when the line
46 of the road came to be located in 1867, the land in controversy was found to be outside the *ten-mile limit* of said road.

And thereupon, the defendant proceeded with the introduction of his evidence and testified in his own behalf as follows:

I am the defendant in this suit; my name is Newton L. Ard. I am over 59 years of age and a citizen of the United States; I settled on the land described in plaintiff's petition, to-wit, the North Half (½) of the Northeast Quarter (¼) of section Eleven (11), Township Twenty-six (26) Range Twenty (20) in Allen County, Kansas; together with the West half (½) of the Southeast quarter (¼) of Sec. Two (2), Township Twenty-six (26) Range Twenty (20) Allen County, Kansas, I settled on said lands July 14th, 1866; the first work I did on said lands was about the last of June, 1866. I broke out about two acres of prairie and three hedge rows on said lands, making about five acres in all; then I went to the United States Land Office at Humboldt, Kansas, which was on the 14th day of July, 1866, and there I made out a homestead application for said land as above described and tendered the application and the land office fees to the Register of the United States Land Office; Watson Stewart, was the Register of said land office at that time. At that time I was a single man and over 21 years of age, a citizen of the United States, and had never had the benefit of the homestead or pre-emption laws of the United States, but the said Register, Watson Stewart, rejected my application and fees, as he stated on the ground that said lands

was immediately within the granted limits of the L. L. & G. R. R. Co., and was double minimum lands, and that he could not let me homestead only 80 acres, as I had included in my application for this land another 80 acres of land, described as the West half (½) of the Southeast quarter (¼) of Section Two (2) in said Township and Range.

Said Register advised me if I wanted said 160 acres, that I could first make a pre-emption filing on 80 acres of land, and put a house on said land within 12 months, and prove up and pay for it at $2.50 per acre, and then I could homestead 80 acres more and by that plan I could get the 160 acres; but said register told me that I could change a pre-emption filing at any time, if I wanted to, into a home-
47 stead. I told said register as he would not allow me my homestead I would make a pre-emption filing on part of the land, as he would not let me claim or file only one 80 acres. So he made out the filing and I paid him a fee of $2.00, which he said was the fee; a copy of said receipt is in words and figures following:

"Register Office, Humboldt, Kansas, July 14th, 1866. No. 2115. I certify that Newton L. Ard has this day filed in this office, his notice to claim by right of pre-emption the West ½ of the Southeast ¼ of Section No. 2, in Township 26 S., in Range No. 20 East of the 6th Principal Meridian in the State of Kansas, $2.50 per acre within the R. R. Limits. Watson Stewart, Register."

The words and figures "$2.50 per acre within R. R. Limits" being written in red ink transversely across the face of the certificate.

In the fall of 1866 I broke said land, and in the winter and spring of 1866 and 1867 I hauled rails and fenced about 4 acres and about the first of March 1867 I built a house on said land, and in the spring of 1867, I put about 4 acres in corn and broke out about 20 acres of prairie, and in the fall put in wheat and in the Winter of 1867 and Spring of '68 I hauled rails and poles and fenced 80 acres of said land as described; and in the Spring of 1868 I put in corn about 4 acres, and broke out with what I had already broken about 75 acres. In the spring of 1867 I heard that all land in Allen County was withdrawn for R. R. purposes; I went to the United States Land Office at Humboldt, about the 1st inst. of June, 1867, for the purpose of changing my pre-emption filing into a homestead. Of the Register, then N. S. Goss, I asked if I could change said filing as described into a homestead. Said Register told me I could not as he said all said land was withdrawn for R. R., and when I withdrew my pre-emption filing the land would revert to the R. R. Then I asked the register if I could pay for the land *under the* pre-emption law, and he told me I could, provided I had a house on said land within six months from the time I made said filing and was living on said land. I told said register, it was about 8 months before I had a house on said land. And I was told by the register, Watson Stewart, that if I got a house on said land within 12 months it would do. The register told me I could not prove up and pay for
48 the land as I did not have a house upon said land within 6 months from the time the filing was made; as said register

said that it was the rules of said office, but he advised me to stay on the land as he thought it would fall outside of the limits of the R. R. and that the R. R. would get land enough without going so far out. I went back home and continued to occupy said land, and in the Spring of 1871 I built another house on said land 12x14, one story high, made out of native lumber covered with shingles, 2 floors and 2 windows. Sometime in February 1872 I went to the United States Land Office and made a further effort to homestead said land as described, but said register refused to receive any fees or grant any homestead papers, giving the reason that the land was withdrawn for R. R. purposes. Said register advised me to stay on said land as he said from where the R. R. was built I was outside of the granted limits, and he thought the Company would get land enough without going so far out from said R. R. roads. So I have kept constantly improving said land and have farmed said land continuously each and every year since 1866, and also have occupied the same since that time, and have 80 acres in cultivation; 120 acres fenced with hedge and wire, a bearing orchard of peach, cherry and apple trees; two wells; corn crib and stable and other buildings; improvements worth $1500.00.

At the time the R. R. Company, through whom the plaintiff claimed title, appraised this land, said appraisers knew and were informed by me that I was homesteading said land, and I had erected valuable improvements thereon; that the R. R. Company's appraisers of the land knew at that time that I had 80 acres under fence and 70 acres in cultivation and ever since the 14th day of July I have been in actual, open, visible and exclusive possession of the land in controversy. At the time I made settlement on said land I was duly competent and qualified to make a valid homestead entry. And I still reside on said land with my family; that I did have all the required qualifications and improvements to enable me to perfect a homestead or preëmption; that when I settled on said lands, I did so in good faith and for the sole purpose of making it my homestead.

(It is admitted that under the Act of Congress of July 26th, 1866 the M. K. & T. R. R. Co. did not file a map of definite location until December 6th, 1866.)

49 That since the decision of this case on appeal to the Supreme Court of the United States, I renewed my application to homestead the land in controversy under and on the strength of the judgment rendered by the Supreme Court of the United States in this action, together with the said West ½ of the Southeast ¼ of Section 2, on or about the 27th day of November, 1896.

The said application was favorably received by the land office then located at Topeka, Kansas, and afterward on making proper proof and paying the required fees, I received a patent therefor, dated December 17th, 1900.

In connection with this testimony, defendant offers said patent to

said land in controversy from the United States to defendant; which patent is in words and figures as follows:

(See amendment p. 43)

"The State of Kansas to all *of* whom these presents shall come, Greeting:

Whereas, the Missouri, Kansas & Texas Railway Company having constructed a railroad and telegraph line from Junction City to the southern boundaries of the State of Kansas, is entitled under the provisions of the Act of Congress approved March 3, One Thousand eight hundred and si-ty three (1863) entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state," and of the act of the legislature of the State of Kansas, approved February 9, one thousand eight hundred and sixty four (1864) entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs" to the following described tracts of land, as certified by the Commissioner of the General Land Office, and approved by the Secretary of the Interior April 10, One thousand eight hundred and seventy three (1873), namely: * * * (among other tracts) The North East quarter (¼) of Section Eleven (11), Township Twenty Six (26) Range Twenty (20), In Allen County, Kansas * * *

Now, know ye that the State of Kansas in consideration of the premises and in conformity with the said law has given and granted and by these presents does give and grant unto the Missouri, Kansas & Texas Railway Company and assigns the said tracts above
50 described, to have and to hold the same together with all rights, privileges, immunities appurtenances of whatsoever nature accruing under the provisions of the laws relating thereto, and in accordance with the act of congress of March 3, 1863, set forth in the foregoing, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embodied in the foregoing.

In Testimony Whereof, I, Thomas A. Ozborn, Governor of the State of Kansas, have caused these letters to be made patent and the seal of the State of Kansas to be hereunto affixed.

Given under my hand at the City of Topeka this nineteenth day of May in the year of Our Lord one thousand eight hundred and seventy three, and of the independence of the United States the ninety seventh, and of the thirteenth year of the State.

By the Governor.

THOMAS A. OZBORN.
W. H. SMALLWOOD,
Secretary of State.

Filed June 13, 1873.
J. S. FAST."

Also a letter from the Department of the Interior General Land Office dated Sept. 18, 1903, directed to L. W. Keplinger, Kansas

City, Kansas, and signed by J. H. Fimple, acting Commissioner; which letter is as follows:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 18, 1903.

SIR: I am in receipt of your letter of August 25, 1903, relative to the conflicting claims of one —— Brandon, your client, and Newton L. Ard to the N. ½ N. E. ¼ Sec. 11, T. 26 S., R. 20. E., Kansas, asking to be advised as to the particulars relating to the issuing of the second patent to this tract to Ard.

In reply to your letter, you are advised that the records of this office show that the N. ½ N. E. ¼ Sec. 11, together with the W. ½ S. E. ¼ Sec. 2, said township and range are both within the overlapping indemnity limits of the Missouri, Kansas and Texas and the Leavenworth, Lawrence and Galveston Railroad Compa-
51 nies. The W. ½ S. E. ¼ Sec. 2, was selected by the Missouri, Kansas and Texas Railway Company April 14, 1873, and patented to said company November 3, 1873, under the act of July 26, 1866.

The N. ½ N. E. ¼, Sec. 11, was jointly selected by said Missouri, Kansas and Texas and Leavenworth, Lawrence and Galveston Companies August 8, 1872, but approved to the State of Kansas, April 10, 1873, for the Missouri, Kansas and Texas Company under the act of March 3, 1863.

By letter, dated November 27, 1896, the local officers at Topeka, Kansas, stated that Newton L. Ard had made formal application to enter the W. ½ S. E. ¼ Sec. 2, and N. ½ N. E. ¼ Sec. 11, T. 26 S., R. 20. E., and, in view of the fact that Ard had before appealed from the action of their predecessors rejecting a former application for the land, asked instructions in the premises.

By letter "F" of December 11, 1896, in view of the ruling of the Supreme Court in favor of Ard as against the railroad company and its transferees in the case of Ard *vs.* Brandon and Pratt (156 U. S. 537), this office directed them to note on their records a reference to the decision of the Supreme Court above cited and to admit his application and to allow him to make final proofs after due publication of notice of intention to do so.

In pursuance thereof, the said Newton L. Ard, made H. E. No. 5569 on December 21, 1896 for said tracts.

It further appears that on January 25, 1900, Ard published notice of his intention to make final proof in support of his claim on March 17, 1900.

Mr. C. H. Pratt and the Missouri, Kansas and Texas Railway Company entered a special appearance for the purpose of making protest against the final proof of Newton L. Ard, and for no other and as a basis therefor made the statement that the W. ½ S. E. ¼, Sec. 2, T. 26, S. R. 20, E. was conveyed to the company by patent dated November 3, 1873, and that the N. ½ N. E. ¼ Sec. 11, T. 26 S., R. 20 E., was certified to the State of Kansas April 10, 1873, by the United States for the benefit of the M. K. & T. Co. and that

both tracts were conveyed by the company to C. H. Pratt, an innocent and *bona fide* purchaser, for value, and that the United States Land Office is without jurisdiction to entertain Ard's application.

52 March 20, 1900, the local officers held that the issues raised by the protests had all been determined by the Supreme Court in Ard's favor in the case above cited and recommended that his final proofs be accepted.

No appeal having been taken therefrom by the protestants, by letter "F" of August 23, 1900, the protests were dismissed, the final proofs admitted and the local officers directed to allow Ard to make final entry and upon payment of the requisite fees to issue final receipts and certificate of current number and date, reporting the same with the monthly returns.

Accordingly, on August 30, 1900, final certificate No. 3534 was issued upon said homestead entry of Ard and the said entry approved by this office October 8, 1900 and patent issued thereon December 17, 1900.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner."

O. G.

It is admitted that said letter states the facts in reference to the application for and the issue of the patent introduced in evidence by the defendant, to the admission of which patent, letter and all the testimony of the defendant, Ard, relating thereto the plaintiff excepts upon the ground that the Land Department was without jurisdiction to take any action relating to said matter by reason of the prior issuance of the patent covering the same lands, which objection was overruled, to which ruling the plaintiff excepted.

It is further admitted that since the issuance of the patent to defendant, the defendant has gone to the Treasurer's office and offered to pay the taxes but found that the taxes had already been paid by the plaintiff.

It is also admitted that the plaintiff contracted with the Railroad company for the purchase of the land in question four years prior to the time of the execution of the deed to the plaintiff, which contract provided for annual payments until the full amount of the purchase money was paid.

It is admitted that the settlers Protective Association of Allen County was organized about the year 1873. The purposes of this organization were to take such legal steps as might be necessary to

53 test the title in the Courts of the Railroad Company to the various lands in Allen County which had been patented to the Railroad Company, of which lands the lands in controversy were a part.

The defendant was an active member of this organization from the time of its organization. That from time to time said organization employed counsel to represent the interests of its members in litigation in which the title of said lands were involved.

That shortly after the commencement of the suit of the U. S. against the M. K. & T. railway Company to set aside the railroad title to said lands of which the lands in controversy were a part, said organization employed Mr. Crane of Fort Scott to assist the Attorney General in the prosecution of said suit.

Since about the year 1885 the defendant was the Corresponding Secretary of said organization.

It was later through the efforts of said organization that said suit was instituted.

Thereupon, defendant having rested, L. W. Keplinger, Attorney for the plaintiff, testified as follows:

I was Attorney for the plaintiff, Mr. Brandon, from the time this controversy arose, although my recollection is that no special appearance was filed in Mr. Brandon's behalf. I, in fact, represented his interests in the case of the U. S. to the M. K. & T. railway Co. and argued the case both before the master and the court on his behalf.

Also I knew of the fact of Mr. Ard having testified on behalf of the government in relation to his claim to the land in controversy in this action and it was my understanding at the time that Mr. Crane of Fort Scott was acting on behalf of the members of the Settlers Protective Association of Allen County in said cause, including Mr. Ard.

And it was my understanding that Mr. Crane was specially employed by the League or its members to appear and assist the Attorney General who was acting on behalf of the U. S.

I was aware of the fact that neither the organization referred to nor its members were parties to that suit.

54 It was agreed that the fair rental value of the land in question for the last three years would — $80 per annum, and for the five years prior to that time the fair rental value was $40 per annum, and prior to the beginning of said five year period and since the beginning of this suit, down to the beginning of said five year period, the rental value would have averaged $25 per annum.

It is agreed that since the beginning of this suit the tax would average about $12.50 per annum.

To each and all of the said testimony the defendant objects upon the ground that the same is incompetent, irrelevant and immaterial.

It is agreed that upon the former trial of this case and as shown by the record on the case filed in the Supreme Court, that the withdrawal of the land in dispute in 1863 shown in evidence herein, was not introduced in evidence nor did the same appear in such record.

The defendant offers in evidence letter of withdrawal from Department of the Interior General Land office April 30, 1867 and received at Humboldt May 10, 1867 as appears in the 27 Kansas Reports on pages 58 and 59.

It is further agreed that any fact shown by the evidence tending to show that plaintiff is or is not entitled to recover in this action, may be considered as fully as if such facts had been properly and

specially pleaded by either party. Commissioner's letter of Dec. 11, 1896.

L. W. KEPLINGER,
Att'y for Pl'ff.
EWING, GARD & GARD,
Att'ys for Def't.

The above was all the evidence introduced upon the trial of said cause. And thereupon said cause was taken under advisement by the Court.

And thereafter, on the 11th day of March, 1905, and while said cause was under advisement, a Stipulation was entered into and filed in said cause and an order made thereon — said cause in the name of the present plaintiffs, as shown by the following which is a copy:—

In the District Court of Allen County, Kansas.

No. 2687.

ALEX BRANDON, Plaintiff,
vs.
NEWTON L. ARD, Defendant.

Order of Revivor.

55 And now on this 11 day of March, 1905, it appearing by stipulation of the parties including attorneys for defendant, that since the submission of said cause, and within one year last past, the above named plaintiff died, and that Lucinda Brandon personally and as executrix of his estate, also Edgar S. Brandon, Nettie Spirey, Edgar Campbell, Elsie McCall, Bertha Walker, Carrie Kimball, and Minnie Boehn, are his successors in interest to the rights and interests asserted in this action, it is by stipulation of counsel ordered that said parties be substituted as plaintiffs, and that said cause stand and be revived as in their names as plaintiffs in this action.

TRAVIS MORSE,
Judge Pro Tem.

Stipulation.

It is hereby stipulated that the facts recited in the above order are correct, and that said order may be entered in said cause.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.
EWING, GARD & GARD,
Attorneys for Defendants.

Messrs. Ewing, Gard & Gard:

Will you please sign above stipulation and hand to Judge Morse. The facts are as stated.

Yours, KEPLINGER.

Endorsed on back as follows:—"No. 2687.—Brandon *vs.* Ard.—Order of Revivor.—Filed Mar. 11, 1905. C. E. Adams, District Clerk."

And said cause having been regularly reached for trial, and all the evidence on behalf of both parties having been introduced, said cause was taken under advisement by the Court. And thereafter, on the 29th of June, 1905, further proceedings were had in said cause, as shown by the Journal Entry thereof which is in words and figures as follows: (Caption and title omitted.)

And now comes the parties hereto, this case having been submitted to the court and having been taken under advisement, and the court being sufficiently advised in the premises, finds generally for the defendant and against the plaintiff;

It is therefore ordered and adjudged that the defendant
56 go hence without day and that he have and recover a judgment against the plaintiff for his costs herein taxed at $—, to which finding and judgment the plaintiffs excepted. Thereupon, and on the same day, the plaintiff moves for a new trial of said cause, and the same coming on to be heard and the court being sufficiently advised in the premises, overruled said motion, to which ruling the plaintiff excepts. And thereupon, and on said date above mentioned, the plaintiff gave notice in open court of an appeal to the Supreme Court of Kansas of this cause; and thereupon, moves the court to grant them sixty days in which to make and serve a case made; and shows to the Court and the Court finds, that the time fixed by statute for making and serving such case made is insufficient; it is ordered that the plaintiffs have sixty days from this date in which to prepare and serve a case made herein, and that defendants have twenty days from the time of service of notice of said case made in which to suggest amendments thereto, the case to be settled on five days notice from either party.

Also, after the rendition of the said judgment in favor of the defendant, the plaintiffs file their motion for new trial in said cause, which is referred to and mentioned in the foregoing journal entry, which motion was in words and figures as follows:—

In the District Court of Allen County.

ALEX. BRANDON, Revived in Name of LUCINDA BRANDON & BRANDON, Executrix; EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE McCALL, BERTHA WALKER, CARRIE KIMBALL, and MINNIE BOEHN, Pl'ffs,

vs.

N. L. ARD, Defendant.

Motion for New Trial.

The plaintiffs move for a new trial in the above cause because of errors occurring at the trial which were excepted to at the time by plaintiffs, which errors were as follows:—

First. The Court erred in the admission of evidence offered by defendant.

57 Second. The Court erred in the rejection of evidence offered by plaintiffs.

Third. The Court erred in failing to render judgment for plaintiffs.

Fourth. The judgment is contrary to law and is not sustained or warranted by the evidence.

Fifth. That in said action and in the trial thereof, there was drawn in question the validity of the authority exercised under the statutes of the United States under which the suit in the U. S. Circuit Court mentioned and referred to in the evidence was instituted and prosecuted and the Court in the rendition of said judgment disregarded rights which plaintiffs had and to which they were entitled to under such statutes and under the judgment rendered in the said action instituted and prosecuted under and by authority of said statutes.

Second. The judgment in this action which is now sought to be set aside is a decision against a right claimed by plaintiffs under the U. S. Statutes by authority of which the case of The United States *vs.* The Missouri, Kansas & Texas Railway Company, *et al.*, mentioned in the evidence, was instituted and prosecuted.

Third. That under the statutes of the United States under which said action was instituted and prosecuted, the title and right of plaintiffs which is asserted in this action was conclusively established both as against the United States and as against the defendant herein, which fact the decision in this case by necessary implication ignores.

L. W. KEPLINGER,
Att'y for Pl'ffs.

Endorsed on back as follows:—"2687.—Brandon *vs.* Ard.—Motion for New Trial.—Filed June 30, 1905. C. E. Adams, District Clerk."

And thereafter, further proceedings were had in said action as shown by the Journal Entry thereof, which is in words and figures as follows:—

In the District Court of Allen County, Kansas.

ALEX BRANDON, Revived in Names of LUCINDA BRANDON and LUCINDA BRANDON, Executrix; EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE MCCALL, BERTHA WALKER, CARRIE KIMBALL, and MINNIE BOEHN, Plaintiffs,

58 *vs.*

N. L. ARD, Defendant.

And now, on this 29th day of June, 1905, said cause comes regularly on to be tried, the plaintiffs appearing by L. W. Keplinger, their attorney, and the defendant appearing by Ewing, Gard & Gard, their attorneys, and the Court having heard and considered

the evidence and being fully advised in the premises, finds generally for the defendant and does consider, order and adjudge that he go without day and that he recover his cost- herein taxed at $——, and hereof let execution issue.

And thereupon, said parties appearing as before stated, said cause comes further on to be heard upon motion of plaintiffs filed in said cause on said day and subsequent to the rendition of judgment asking for a new trial, and the Court upon consideration thereof does overrule said motion, to which ruling the plaintiffs did then and there except; and thereupon, the plaintiffs moved the Court for time to prepare and serve a case-made for the Supreme Court, the parties being represented as above stated, and it appearing and being shown that the time fixed by statute for such purpose will be insufficient, the Court does order that plaintiffs have sixty days from the time of the making of this order in which to prepare and serve a case-made. Also, the Court does order that defendant have fifteen days from the time of the service of such notice in which to suggest amendments thereto; the case to be settled on five days' notice from either party.

TRAVIS MORSE,
Judge Pro Tem.

Endorsed on back as follows:—"2687.—Brandon *v.* Ard.—Journal Entry of Judgment. Filed June 30, 1905. C. E. Adams, District Clerk."

And thereafter, and on the 14th of July, 1905, a stipulation was entered into between the parties to said action, which was assented to by the Court and the statement of facts therein adopted by the Court as a part of the evidence upon which the prior action of the Court is based, which stipulation is in words and figures as follows:—

59 In the District Court of Allen County, Kansas.

BRANDON, Executrix, and Personally, *et al.*, Plaintiffs,
vs.
N. L. ARD, Defendant.

Stipulation.

It is hereby stipulated that with the assent of the Judge there shall be added as a part of the evidence on behalf of the defendant, the following:

1st. It is admitted that the road from the city of Leavenworth to the town of Lawrence mentioned in the Act of March, 3rd, 1863, was never constructed.

2nd. That the suit of the United States against the M. K. & T. Railway Company, *et al.*, originally brought November 19th, 1886, was only brought for the cancellation of patents to even numbered sections that are within the original ten mile limit of the L. L. &

G. R. R., and which are also within the indemnity limits of the M. K. & T. Ry. Co.

3rd. Even numbered sections within the common indemnity limits of both roads.

After the decision in said case in the U. S. Supreme Court, reported in 12th S. C. R. page 13, and long subsequent to the commencement of this action, the original bill in said case against the M. K. & T. R. R. Co. was amended, as is shown by the pleadings in said cause, introduced in evidence in this case, and Alexander Brandon was made a party thereto by such amendment. The said amendment was caused to be made in part through the efforts of the Settlers' Protective Association, mentioned in the testimony of N. L. Ard, and the admissions which are part of the evidence herein.

It is agreed that this stipulation shall be submitted to the Court and that without further argument, the same shall be considered by the Court as a part of the evidence in this case, the same as if introduced upon the trial of the case.

And in the event such evidence would not in the judgment of the Court alter the judgment and ruling of the Court based on the evidence heretofore introduced, the same shall be incorporated in the case made, with other evidence.

Witness our signatures this 14th day of July, A. D. 1905.

L. W. KEPLINGER,
Att'y for Pl'ffs.
EWING, GARD & GARD,
Att'ys for Def'ts.

60 The above and foregoing case-made is a true, full and correct record and statement of all proceedings had in the foregoing cause, and the same contains all the evidence introduced by the respective parties therein.

L. W. KEPLINGER,
Attorney for Plaintiffs.

(Endorsed:) Brandon *vs.* Ard. Filed July 24, 1905. C. E. Adams District Clerk. Refiled Aug. 12, 1905. C. E. Adams, Clerk District Court.

In the District Court of Allen County, Kansas.

LUCINDA BRANDON, Personally, LUCINDA BRANDON, Executrix of the Estate of Alex Brandon, Deceased, EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE MCCALL, BERTHA WALKER, CARRIE KIMBALL and MINNIE BOEHN, Plaintiffs,

vs.

NEWTON L. ARD, Defendant.

Defendant's Suggestions of Amendments to Plaintiffs' Case-made.

The defendant suggests as amendments to plaintiffs' case-made,

1st. Strike out the four last lines on page 32 and all of page 33

down to and including the words "filed June 13, 1873, J. S. Fast," and insert in lieu thereof, the following:—

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

61 Homestead Certificate No. 3534.

Application 5569.

Whereas there has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Topeka, Kansas, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Newton L. Ard has been established and duly consummated, in conformity to law, for the West half of the South east quarter of Section two, and the North half of the North East quarter of Section eleven in Township twenty six South of Range twenty East of the Sixth Principal Meridian in Kansas, containing one hundred and sixty acres according to the Original Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General:

Now know ye, that there is, therefore, granted by the United States unto the said Newton L. Ard, the tract above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Newton L. Ard and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the seventeenth day of December, in the year of our Lord one thousand nine hundred and of the Independence of the United States the one hundred and twenty fifth.

By the President:

WILLIAM McKINLEY,
By F. M. McKEAN, *Secretary.*
[SEAL.] C. H. BRUSH,
Recorder of the General Land Office.

Recorded Kansas, Vol. 109, Page 290.

On the back of said instrument is endorsed the following:

3534. Patent.

STATE OF KANS., *Allen County, ss:*

United States to Newton L. Ard.

Entered for transfer in my office this 28 Feb., 1901.
Fees $1.25 Pd.

C. A. FRONK, *Co. Clerk.*

STATE OF KANSAS, *Allen County, ss:*

Filed for record this 28" day of Feb'y A. D. 1901, at 1 o'clock P. M. and duly Recorded in Book 27 of Deeds Page 224.

62 H. P. FOWLER,
Register of Deeds.
By GENIE BERKHISER, *Deputy.*

2nd. At the close of page 31, insert the following: The letter of withdrawal dated April 30, 1867, introduced by defendant which is mentioned near the bottom of page 35, was in words and figures as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 30, 1867.

Register and Receiver, Humboldt, Kansas:

Under date of March 19, 1863, I transmitted to you a diagram, showing the designated line of route, with the ten-mile or granted limits of the Leavenworth, Lawrence & Galveston railroad, for which a grant of land is made to Kansas by the act of congress approved March 3, 1863.

By my letter accompanying the diagram, I ordered, with the approval of the secretary, that the odd sections within said limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to pre-emption and homestead entry, at $2.50 per acre.

Herewith I enclose a map of the actual location of the route of said road, with that portion of the ten and twenty-mile limits designated by sectional lines as falling within your district. You will now withhold from sale or location, preemption or homestead entries, all the *odd* sections within the limits of twenty miles, as laid down on the accompanying diagram, the *even* sections within the ten-mile limits being held at $2.50, as under the former withdrawal.

Where settlements may be shown to have been made upon an *even* section, falling within the lines of the ten-mile limits as originally withdrawn, and *within the ten-mile limits*, as shown on the present diagram, you will allow the party to prove up and pay for the land at the ordinary minimum price, provided said settlement was made prior to the receipt by you of this order of withdrawal; and for your guidance in this matter, I have marked on the diagram

the line of original withdrawal. Also, where settlement may have been on an *odd* numbered section outside of the *ten* and
63 within the *twenty*-mile limits, prior to the receipt by you of this order of withdrawal, the settler will be protected in his rights by reason of such prior settlement.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

64 The letter from the Commissioner of December 11, 1896, introduced by defendant, which is mentioned at the bottom of page 35, is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August*, 23, 1900.

Register & Receiver, Topeka, Kansas.

SIRS: May 9, 1900, you transmitted testimony and papers in the case of C. H. Pratt & Mo. Kans. and Tex. Ry. Co. *vs.* Newton L. Ard, involving the W. ½ S. E. ¼, Sec. 2, and the N. ½ N. E. ¼ Sec. 11, Tp. 26 S., R. 20 E.

The papers transmitted show that on January 25, 1900, Mr. Ard caused to be published notice of intention, to make final proof, March 17, 1900, of his claim to the tracts under his homestead entry, No. 5569, embracing the same.

Mr. Pratt and the said Company entered special appearance in the case for the purpose of making protest against the final proof of N. L. Ard under his notice, and for no other purpose, and as a basis for the protest made the statement that the W. ½ S. E. ¼, Sec. 2, Tp. 26 S., R. 20 E., was conveyed to the Company by patent dated Nov. 3, 1873, and that the N. ½ N. E. ¼, Sec. 11, Tp. 26 S., R. 20 E., was certified to the State of Kansas April 10, 1873, by the United States for the benefit of the M. K. and T. Co. and that both tracts were conveyed by the Company to C. H. Pratt, an innocent and *bona fide* purchaser, for value,—and that the United States Land Office is without jurisdiction to entertain said application of Mr. Ard.

Dec. 11, 1896, under the law as construed by the Supreme Court in the case, Ard *vs.* Brandon and Pratt, involving the tracts here in question (156 U. S., 537) this office directed that Mr. Ard's application to make entry for the tracts be accepted. The proofs submitted show that Mr. Ard established his residence on the land about
65 February 1867 and has been a resident of the premises continuously ever since; that his improvements there are of the value of $1500.00; and that he has cultivated the land and raised crops thereon thirty-two years consecutively, and the protestants offered no counter proofs. March 20, 1900, you held that the issues raised by the protests had all been determined by the Supreme Court in favor of Mr. Ard in the case cited above, and you recommend that his final proofs be accepted. No appeal has been filed from your action, and, as the proofs are satisfactory, your recommen-

dation is concurred in, the protests are dismissed, and the final proofs admitted.

Mr. Ard will, therefore, be allowed to make final entry and upon the payment of the requisite fees, you will issue final receipt and certificate on his Homestead Entry No. 5569, giving to the same current number and date, and report the same with your current returns.

Advise the parties in interest of this action.

Very respectfully, W. A. RICHARDS,
Acting Commissioner.

BWM.
MDT.

66 The defendant objected to each and every item of evidence introduced by plaintiffs upon the ground that the same was irrelevant, incompetent and immaterial, and especially objected to the pleadings in the case of the United States *vs.* The M. K. & T. R. R. Co. and Master's Report and decree in said case offered in evidence by the plaintiffs, upon the ground that the same was incompetent, irrelevant and immaterial, and because no sufficient foundation was laid and for the reason that the defendant was not a party to said suit.

Defendant also objected to the introduction of testimony of the withdrawal of the land by any statement of any withdrawal purporting to be made of taking effect in 1863, or under the act of March 19, 1863, in favor of the L., L. & G. R. R. Co., for the reason that the same is incompetent, irrelevant and immaterial and for the reason that said order of withdrawal was inadvertently and wrongfully made, and for the reason that said L., L. & G. R. R. Co. was not entitled to said order of withdrawal because it had not complied with the act of congress granting said land requiring said company, before it was entitled to said lands, to complete the construction of its line of road to Lawrence and because said L., L. & G. R. R. Co. never did build or complete a line of railway from Lawrence to Leavenworth as required by act of Congress granting to it said lands, and because said letter of withdrawal was issued to and for the benefit of the L., L. & G. R. R. Co., and the said L., L. & G. R. R. Co. had not and never has earned any indemnity lands under said act, and because the plaintiffs obtained no rights by virtue of said withdrawal; which objections and each of them the Court overruled, to which ruling the defendant duly excepted.

EWING, GARD & GARD,
Attorneys for Defendant.

The plaintiffs admit the correctness of the foregoing suggestions of amendments and consent that the same may be allowed.

L. W. KEPLINGER,
Attorney for Plaintiffs.

67 *Stipulation.*

All amendments to the foregoing plaintiffs' case-made, suggested by defendant, having been agreed to by plaintiffs, it is hereby stipulated that said case-made so amended may be settled by the Court without notice to or from either party.

L. W. KEPLINGER,
Att'y for Pl'ffs.
EWING, GARD & GARD,
Att'ys for Def't.

Aug. 5th, 1905.

I, the undersigned Judge *Pro Tem* of the District Court of Allen County, Kansas, who tried the case, do hereby certify that the foregoing was presented to me as a Case made, the plaintiffs appearing by L. W. Keplinger, their attorney, and the defendant appearing by Ewing, Gard & Gard, his attorneys, and all the amendments suggested by defendant having been allowed, I now settle and sign the same as a true and correct Case Made, and direct that the same be attested and filed by the clerk of said court.

Witness my hand at Iola in Allen County, this 5th day of August 1905.

TRAVIS MORSE,
District Judge, Pro Tem.

Attest:
C. E. ADAMS,
[SEAL.] *Clerk.*

68 Be it further remembered, that afterwards on the 11th day of May, A. D., 1906, the same being one of the regular judicial days of the January, A. D., 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:

69 Journal Entry of Submission.

No. 14673.

LUCINDA BRANDON ET AL., Plaintiffs in Error,
vs.
NEWTON L. ARD, Defendant in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Allen county; and thereupon after oral argument by L. W. Keplinger, for the plaintiffs in error, said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court.

70 Be it further remembered, that afterwards, on the 6th day of October, A. D., 1906, the said being one of the regular judicial days of the July 1906 term of the Supreme Court of the

State of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:

71 *Journal Entry of Decision.*

No. 14673.

LUCINDA BRANDON ET AL., Plaintiffs in Error,
vs.
NEWTON L. ARD, Defendant in Error.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed*. It is further ordered that the plaintiffs in error pay the costs of this case in this court taxed at $—, and hereof let execution issue.

72 Be it further remembered that also on the 6th day of October, A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the syllabus and opinion of said court which syllabus and opinion are in words and figures as follows, to-wit:

73 No. 14673.

LUCINDA BRANDON ET AL.
v.
NEWTON L. ARD.

Error from Allen County.

Affirmed.

Syllabus by the Court.

GREENE, *J.*:

1. A judgment against the United States in an action to cancel a patent to a railroad company, will not bar a homestead settler from pleading his homestead settlement as a defense in an action in ejectment brought against him by a grantee of the railroad company.
2. Where, in a grant of land to a railroad company, there is expressly reserved from its operation all lands to which the right of preemption or homestead settlement has attached when the line is definitely fixed, the land commissioner, in the absence of express direction by Congress, and prior to the definite location of the line, has no authority to issue an order withdrawing from preemption or homestead settlement any of such lands, and such an order, if issued, is nugatory.

All the justices concurring.

A true copy.

Attest:

——— ———,
Clerk Supreme Court.

74

No. 14673.

LUCINDA BRANDON ET AL.
v.
NEWTON L. ARD.

Error from Allen County.

Statement.

This was an action for the possession of the north ½ of the northeast ¼ of section 11, township 26, range 20, in Allen county, brought by Alexander Brandon against Newton Ard. Since the action was commenced Alexander Brandon died and it has been revived in the name of his executors and heirs. The defendant recovered judgment and the plaintiffs bring the case here for review.

The plaintiffs claim title by a deed from the Missouri, Kansas & Texas Railway Company, which held by patent from the governor of Kansas dated May 19, 1873, issued by virtue of a grant of land by the United States to the State of Kansas, dated March 3, 1863, to aid in the construction of railroads and telegraphs. The act provided that there shall be granted every alternate section of land designated by odd numbers, for ten sections in width on each side, in aid of the construction of the following roads, and each branch thereof: First, a railroad and telegraph from the city of Leavenworth, Kansas, by way of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state in the direction of Galveston bay, in Texas, with a branch from Lawrence, by the Valley of the Wakarusa river, to a point on the Atchison, Topeka & Santa Fe Railroad where that road intersects the Neosho river; second, a railroad from the city of Atchison, Kansas, via Topeka, to the western line of the state in the direction of Fort Union and Santa
75 Fe, N. M. with a branch where the latter crosses the Neosho, down said Neosho Valley, to the point where the road first named (The Leavenworth road) enters the Neosho valley. This grant contains the following limitations:

"But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid,

shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said roads and branches: *Provided, further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided." (12 St. at large, p. 772).

The corporation known as the Atchison, Topeka & Santa Fe Railroad company acquired the right to the lands designated, under the second subdivision of this act, and all rights granted it by this act for the construction of its branch from a point at or near Fort Riley down the Neosho valley to where the Leavenworth road might enter the Neosho valley were assigned to and became vested in the
76 Missouri, Kansas & Texas railroad company, March 3, 1865, and this assignment was ratified by the legislature of Kansas, February 26, 1867.

Following the passage of this act of 1863, and on March 19, 1863, the commissioner of the land office, without being advised by the filing of a plat of general location of the road and solely upon the request of the senators and representatives in Congress from Kansas, transmitting to the Register and Receiver of the local land office at Humboldt, Kansas, a letter of withdrawal and a diagram showing the probable lines of the L. L. & G. Railroad. The letter of withdrawal contains the following instruction:

"You will, therefore, understand from the foregoing:

1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, preemption, or homestead entry, except so far as inceptive rights may have accrued prior to the receipt by you of this order."

The land in controversy is a portion of the lands described in the diagram. In 1867, the L. L. & G. filed its map of definite location. It was then found that the land in question was outside its place limits but within its indemnity limits. The M. K. & T. railroad definitely located its line in December, 1866, and the land in controversy fell without its place limit but within its indemnity limits. The land was therefore outside the place limits, but within the overlapping indemnity limits of both roads. This land was selected by the M. K. & T. railroad as indemnity lands and was patented to it by the patent hereinbefore referred to, and was conveyed to Alexander Brandon by the railroad company. The w ½ of the southeast ¼ of section 2, township 26, range 20, which adjoins the tract in controversy, was selected by the L. L. & G. railroad as indemnity lands and was patented to it, November 3,
77 1873. This company sold this land to Charles H. Pratt.

Ard claims title to both tracts under a homestead settlement made June 1866. He possessed all the necessary qualifications to homestead 160 acres of land of the public domain. In June, 1866, he settled and made substantial improvements on this land for the purpose and with the intent of perfecting a title thereto as

his homestead. On July 14, 1866, he prepared his homestead application in due form and the requisite affidavits, and went to the local land office at Humboldt with his witnesses and presented his application and affidavits and tendered the entry fee to the proper officers and requested that he be allowed to enter the two tracts as a homestead. His application was rejected by the officer in charge on the ground that the lands had been withdrawn from preemption and homestead entry by the instructions contained in the letter of the commissioner of the land office of March 19, 1863. Mr. Ard returned to the land and has been in the actual occupancy thereof since his original entry always claiming the right to enter it as a homestead. He subsequently made several applications to the local land officers for permission to enter this land as a homestead but each time was denied the right for the same reasons assigned on his first application, until December 21, 1896, when he was permitted to make homestead entry upon which a patent was issued, December 17, 1900.

In June, 1887, separate actions in ejectment were commenced in the district court of Allen county by Pratt and Brandon against Ard for the possession of these lands, Pratt claiming the land in section 2 under his purchase from the L. L. & G. railroad and Brandon claiming the tract now in controversy under his purchase from the M. K. & T. Railroad. The causes were tried in the district court and Ard was defeated. He prosecuted separate proceedings in error to this court where both judgments were affirmed. (Ard *v.* Pratt, 43 Kan. 419, and Ard *v.* Brandon, 43 Kan. 425). Ard appealed both cases to the supreme court of the United States where the judgments of the district court, as well as the judgments of this court were set aside and the causes remanded for retrial. (Ard *v.* Brandon and Ard *v.* Pratt, 156 U. S. 537.)

Afterwards and while they were awaiting a retrial in the
78 district court of Allen county, the United States, under an act of Congress passed March 3, 1887, requiring the immediate adjustment by the secretary of the interior, in accordance with the decisions of the supreme court of the United States, of all unadjusted land grants made by Congress to aid in the construction of railroads, (24 St. p. 556, c. 376) commenced an action in the United States circuit court for the district of Kansas against the M. K. & T. railroad and other railroad companies to cancel their patents to certain even numbered sections of land in Allen county. Subsequently the bill was amended and certain odd numbered sections within the indemnity limits were included and all parties holding such lands under deed from the railroads appear to have been made defendants. By the amended bill the land in question was included in the action and Alexander Brandon was made a defendant. In this action the United States was unsuccessful and judgment was rendered against it. Ard was not a party to that action and was not represented, unless it can be said, as claimed by the plaintiffs in error, that he was a party by representation, that is, that the United States was the representative of all persons claiming adversely to the M. K. & T. railroad.

79 No. 14673.

LUCINDA BRANDON ET AL.
v.
NEWTON L. ARD.

Error from Allen County.

Affirmed.

Opinion of the court was delivered by GREENE, *J.:*

Plaintiffs in error contend, *first*, that the judgment against the United States in the case of the United States *v.* The M. K. & T. railroad *et al.*, decided in the circuit court of the United States, was a full and complete judicial determination that Ard had acquired no equity in the real estate by his settlement and several attempts to homestead it and that such judgment is a complete bar against his contentions in this action; *second*, that the letter of the Land Commissioner of March 19, 1863, withdrawing all the odd numbered sections for ten miles on each side of what he supposed would be the line of the L. L. & G. railroad was a segregation and setting apart of this land for this railroad company—a withdrawal from market of all odd numbered sections indicated in the diagram—and that the lands thus withdrawn remained permanently exempt from pre-emption entry and homestead settlement.

We do not agree with the first contention. The action of the United States against the several railroad companies was not commenced, as suggested by plaintiffs in error, by the procurement of Ard. It was brought by the Attorney General of the United States at the request of the Secretary of the Interior under the act of Congress of March 3, 1887, authorizing and directing the Secretary of the Interior:

"To immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted."
(24 St. at large, chap. 376.)

80 Ard by settling on this land and attempting to perfect a homestead title thereto did not thereby become a ward of the government. He did not constitute the United States his trustee to litigate for him his equitable rights to the land upon which he had settled, nor did it become such trustee by operation of law. Ard was not made a party to the action. He had no control or supervision over any issue in the case. He was asking nothing at the hands of the court and so far as anything appears to this court no person was asking anything against him.

The act did not authorize the Secretary of the Interior to institute proceedings in equity to settle controversies arising between individual claimants to these lands, nor to adjust disputes between the railroad companies and persons claiming adversely to them. The action was one to determine the right of the railroad companies to

hold the legal title to these lands as against the United States. The questions involved were those arising exclusively between the United States on the one side and these corporations and persons claiming the legal title to the lands under them on the other side. Ard was not made a party because his equitable claim to the land, as against the railroad company or its grantee, was not involved and could not be determined. The United States was not interested in the litigation pending between Ard and Brandon involving their equitable rights to any particular tract of land. In Ard *v.* Brandon, 156 U. S. 537, it was urged that, under the authorities of the cases of Kan. City, & R. R. Co. *v.* Attorney General, 118 U. S. 682, and the United States *v.* Missouri K. & T. Ry. Co., 141 U. S. 358, sustaining the regularity and validity of certain patents to the M. K. & T. railroad company, an individual could not thereafter contest nor question the right of the company to any lands to which it held patent. In the opinion, referring to these cases, the court said:

"No adjudication against the government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued."

81 It is also contended that if it should be held that Ard was not a party by representation to the suit in the United States *v.* M. K. & T. *et al.*, and is not for that reason concluded, that he should nevertheless, by reason of his presence and participation in that action, be held to be estopped by that judgment. We have no doubt of the correctness of the rule that one not a party to the record may, by his conduct in directing, managing, and actually participating in the trial, be estopped by the judgment therein as to any question actually litigated and decided. However, the vital question in this case is the effect of the order of withdrawal, and we do not find that this question is tendered by the bill, nor litigated in the action, or determined by the judgment.

Plaintiff's second contention that the diagram and order of withdrawal of March 19, 1863, had the effect to segregate all the lands included in the diagram from the public domain and set it apart for the exclusive use of railroad companies is not well founded, nor was such the understanding of the land department as is conclusively shown by the order from that department to the local land office of April 20, 1866, after the L. L. & G. had filed its map of definite location, directing the withdrawal of certain lands for its benefit. In this letter the commissioner says:

"Also, where settlement may have been made on an odd numbered section outside of the ten and within the twenty mile limits prior to the receipt by you of this order of withdrawal the settler will be protected in his rights by reason of such prior settlement."

Regardless of any interpretation subsequently placed upon the order of withdrawal of March 19, 1863, by the land commissioner and regardless also of what such order contained, the grant itself reserved from its operation all of the public domain which had, prior to the definite location of any line of road, been sold by the United States or otherwise reserved, and all the lands to which, prior to such

definite location, the right of preemption or homestead settle-
82 ment had attached and lands falling within any of these provisions when the line was definitely fixed were excluded from the granting clause of the act. Ard's homestead rights attached prior to the definite location of any line of railroad. He is therefore within the exact provision of one of the reservations in the grant. The pretended withdrawal, if given the effect contended for by plaintiffs in error, would be giving such commissioner power to nullify one of the important reservations in the grant.

This precise question was before the supreme court in Nelson *v.* Northern Pacific Railway, 188 U. S. 108. The grant contained the following reservations:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

83 An order of withdrawal dated November 1, 1873, was issued by the commissioner of the land office which included the land in controversy in that action. Subsequently and in 1881, and before the railroad company had definitely located its line, Nelson made a homestead settlement upon a portion of the land within the place limits as shown by the map of definite location. The contention was that the withdrawal order withdrew the land from preëmption and homestead settlement. In the opinion, at page 116, the court said:

"But we have also seen, looking at the third section, which was the granting section of the act, that Congress did not *grant* every odd-numbered alternate section within the general limits specified, but *only* the odd-numbered alternate sections to which the United States had full title, and which had *not* been previously reserved, sold, granted or otherwise appropriated, *and* which were *free* from preemption or 'other claims or rights' *at the time* the line of the road was *definitely fixed*—giving to the railroad company the right to

select lands, within certain limits, in place of such as were found, *at the date of definite location*, to have been disposed of or to be *'occupied by homestead settlers.'"*

It was held that the order of withdrawal did not withdraw the land from homestead settlement and many cases are cited sustaining this conclusion. In the opinion the expressions used by Mr. Justice Field in Buttz *v.* Northern Pacific Railroad, 119 U. S. 55, 71 and 72, relied upon by plaintiffs in error, to the effect that:

"When the general route of that road was made known by map duly filed and accepted, 'the *law* withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted'" is quoted and commented on as follows:

84 "But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of *general* route, the *law* withdrew the odd-numbered sections, then the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new doctrine in the Buttz case; for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated 'the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the *grant* to *such* alternate odd sections as have not *at that time*, been reserved, sold, granted, or otherwise appropriated, and free from preëmption, grant, *or other claims or rights*;'"

Again in the later case of Sjoli *v.* Dreschel, 199 U. S. 564, it was said that:

"No right to land within indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior.

That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under preëmption and homestead laws of the United States; and,

That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

85 A critical examination of the cases which are said to maintain a contrary rule will show that they were cases arising under grants which directly authorized a withdrawal, or between original and subsequent grantees claiming the same lands, and, in the

latter cases the question was what was to be understood by the term "public lands" as used in the subsequent grant, that is, whether it was exclusive of lands covered by a former grant not yet earned. It happened in many of the cases that the lands covered by the prior grant had been withdrawn by the Secretary of the Interior but this was not the controlling feature of the decision. The holdings generally have been that the term "public lands" as used in the subsequent grant excluded lands included within prior grants.

Wallace *v.* Chapman, 101 U. S. 755, cited by plaintiffs in error, is a case of the first class. This controversy arose over a general land grant made to the State of Iowa of 500,000 acres of land or internal improvements, dated September 4, 1841. These lands were to be selected from any public lands, "except such as is or may be reserved from sale by * * * proclamation of the President of the United States." April 6, 1850, the Secretary of the Interior directed that certain lands in the state of Iowa be reserved from sale in order to settle the rights of rival claimants thereto. On July 20, 1850, the agent of the state of Iowa having in charge the school lands and school fund gave notice at the General land office that he had selected a portion of lands thus withdrawn as a part of the 500,000 acre grant under the act of 1841. It was held that the order of withdrawal was authorized by the grant and all lands which had at the time been reserved and all that might thereafter be reserved by the proclamation of the President were excepted from the grant. It was also held that the order of withdrawal issued by the Secretary of the Interior must be held to have been by proclamation of the President and was the withdrawal provided for in the grant.

86 The case of Northern Lumber Co. *v.* O'Brien, 139 Fed. 614, also relied upon by plaintiffs in error, does not involve the question we are called upon to decide. It does however recognize the rule as here stated. In distinguishing the question presented to it from the one in Nelson *v.* Northern Pacific, *supra*, and other similar cases, the court said:

"None of these cases has particular reference to or makes the decision turn upon the clause, 'there be, and hereby is, granted * * * every alternate section of public land,' which makes the grant one in *praesenti* of land then public, but instead each had particular reference to and makes the decision turn upon the limitation on the granting clause, which makes it also requisite that 'the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights at the time the line of said road is definitely fixed.' They all recognize the well-established rule, that the grantee under a railroad land grant acquires, by designating the general route of its road, only an inchoate right to the odd-numbered sections granted by Congress, and that until the definite location of the road these sections remain within the disposing power of Congress, and this, even though they be withdrawn for the protection of the grant, as in the present case."

The well established rule, therefore, is that where lands are granted to a railroad with certain reservations, for purposes designated in the grant, in the absence of express authority, the Secretary of the In-

terior or the land commissioner, is powerless to make any order with reference thereto which will have the effect to defeat the reservations. Congress has exclusive authority to dispose of the public domain, and in the absence of its adoption of any specific rule for carrying out its purpose the land department may adopt such rules and regulations as to it may seem proper for that purpose, but in the absence of express authority, that department is powerless to adopt a procedure which will defeat the express intention of Congress in the disposition of the public domain. Congress, in the grant in question, ex-
87 pressly reserved from its operation all lands which should be sold or reserved by the United States, or to which the right of preëmption or homestead settlement had attached when the line of said railroad or branches are definitely fixed. The lands falling within these reservations were not granted to the railroad companies, and the land commissioner had no authority by any act to deprive those for whose benefit the reservations were made of the privilege of exercising that right.

The judgment is affirmed.

All the justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

88 In the Supreme Court of the State of Kansas.

LUCINDA BRANDON ET AL., Plaintiffs in Error,

vs.

NEWTON L. ARD, Defendant in Error.

I, D. A. Valentine, clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed, and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness my hand and the seal of the Supreme Court of the State of Kansas hereto affixed at my office in Topeka this 8th day of January, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk of the Supreme Court of the State of Kansas.

89 Hereafter follows the petition for the writ of error, the assignments of error, the order allowing the writ of error and fixing the bond for appeal, a copy of the bond, the writ of error and the allowance thereof and the citation, together with the acknowledgment of service thereof.

90 *Journal Entry of Application for Writ of Error.*

No. 14673.

LUCINDA BRANDON, Plaintiff in Error,
vs.
NEWTON L. ARD, Defendant in Error.

Lucinda Brandon, plaintiff in error herein, by her attorney L. W. Keplinger having presented her application for a writ of error to the Supreme Court of the State of Kansas to correct the judgment rendered by the said court against her in a suit wherein she was plaintiff in error and Newton L. Ard was defendant in error, and having presented with said application her due assignments of error in that regard, presented a citation to be signed accordingly, it is *ordered* that said *writ* of *error* be *allowed* and said *citation signed.*

91 In the Supreme Court of the State of Kansas.

LUCINDA BRANDON, Personally and as Administratrix of the Estate of Alexander Brandon, Deceased, EDGAR S. BRANDON, NETTIE SPIVEY, EDGAR CAMPBELL, ELSIE MCCALL, BERTHA WALKER, CARRIE KIMBALL, and MINNIE BOEHN, Plaintiffs,
vs.
NEWTON L. ARD, Defendant.

Bond.

Know all men by these presents:—That we, Lucinda Brandon, personally and as administratrix of the estate of Alex Brandon deceased, Edgar S. Brandon, Nettie Spivey, Edgar Campbell, Elsie McCall, Bertha Walker, Carrie Kimball and Minnie Boehn, plaintiffs, as principals, and S. M. Knox and —— —— as sureties, are held and firmly bound unto Newton L. Ard, in the sum of Four Hundred Dollars ($400.00) to be paid to the said Newton L. Ard, to which payment well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of December, 1906.

Whereas, the above named plaintiffs seek to prosecute their Writ of Error to the United States Supreme Court to reverse the judgment rendered in the above entitled action, by the Supreme Court of the States of Kansas,

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said Writ of Error to effect and answer all costs and damages that may be

adjudged, if it shall fail to make good its pleading, then this obligation to be void, otherwise to remain in full force and effect.

LUCINDA BRANDON,
Personally and as Administratrix of the Estate of Alex Brandon, Deceased,
EDGAR S. BRANDON,
NETTIE SPIVEY,
EDGAR CAMPBELL,
ELSIE McCALL,
BERTHA WALKER,
CARRIE KIMBALL &
MINNIE BOEHN,
By L. W. KEPLINGER,
Their Att'y.
S. M. KNOX.

92 This bond is perfectly good.
L. W. KEPLINGER.

Bond approved for costs only this 15th day of Dec., 1906.
W. A. JOHNSTON,
Chief Justice.

Filed Dec. 13, 1906.
D. A. VALENTINE,
Clerk Supreme Court.

(Endorsed:) Bond. Filed Dec. 13, 1906. D. A. Valentine, Clerk Supreme Court.

93 The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of the State of Kansas on the 13th day of December, A. D. 1906, and the following endorsement made thereon:
Bond. Filed December 13, 1906. D. A. Valentine, Clerk Supreme Court.

94 In the Supreme Court of the State of Kansas.

Filed Dec. 13, 1906. D. A. Valentine, Clerk Supreme Court.

LUCINDA BRANDON, Personally and as Administratrix of the Estate of ALEXANDER BRANDON, EDGAR S. BRANDON, NETTIE SPIREY, EDGAR CAMPBELL, ELSIE McCALL, BERTHA WALKER, CARRIE KIMBALL and MINNIE BOEHN, Plaintiffs,
vs.
NEWTON L. ARD, Defendant.

Petition for Writ of Error, Assignment of Errors, and Prayer for Reversal.

Considering themselves aggrieved by the final decision and judgment of the Supreme Court in rendering judgment against them in the above entitled cause, the plaintiffs above named hereby pray a writ of error from the said decision and judgment to the United

States Supreme Court, and an order fixing the amount of a supersedeas Bond.

And the said plaintiffs, Lucinda Brandon, personally and as administratrix of the estate of Alexander Brandon, deceased, Edgar S. Brandon, Nettie Spirey, Edgar Campbell, Elsie McCall, Berthan Walker, Carrie Kimball and Minnie Boehn, assign the following errors in the record and proceedings of the said cause.

The Supreme Court of Kansas, erred in that it denied a right title, privilege and immunities claimed by plaintiffs under the statutes of the United States, and under an authority exercised under the statutes of the United States.

Said errors more particularly stated are as follows:—

First. That in the case of the United States *vs.* The Missouri, Kansas & Texas Railway Company which was brought in the United States Circuit Court for the District of Kansas under authority of the Act of July 3, 1887, all questions involved in this action were finally determined in favor of the plaintiffs herein, and that defendant is concluded thereby, but the Supreme Court of Kansas in its decision refused to follow such determination.

Second. That in said action there was necessarily involved
95 the question as to whether or not the land in controversy passed to those under whom plaintiffs claim title under the land grant Act of March 3rd, 1863, and other grants supplemental thereto, and the Court held and decided, that said land did not come within said grants and that for that reason plaintiffs had no title.

Third. That in said action there was necessarily involved the question as to the effect of the order of the land department of March 19, 1863, withdrawing the lands in controversy from Homestead and Pre-emption and the Plaintiffs claimed that such order placed said lands in such conditions that no homestead or pre-emption right could thereafter attach thereto, and that for that reason said lands were covered by the grant of March 3, 1863, and acts supplemental thereto, under and through — plaintiffs claim title, but the Court held and decided that defendant's rights as a homestead claim did attach to said land and that for that reason the land did not pass to these through whom plaintiffs claim title.

LUCINDA BRANDON,
Personally and as Administratrix of the Estate of Alex Brandon, Deceased,
EDGAR S. BRANDON,
NETTIE SPIREY,
EDGAR CAMPBELL,
ELSIE McCALL,
BERTHA WALKER,
CARRIE KIMBALL,
MINNIE BOEHN,
By L. W. KEPLINGER,
Their Att'y.

Filed Dec. 13, 1906.
D. A. VALENTINE,
Clerk Supreme Court.

[Endorsed:] In the Supreme Court of the State of Kansas. Lucinda Brandon, personally and as administratrix of the estate of Alex Brandon *et al., vs.* Newton L. Ard. Petition for Writ of Error to U. S. Supreme Court.

96 EXHIBIT "B."

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Lucinda Brandon, personally and as administratrix of the estate of Alexander Brandon, Edgar S. Brandon, Nettie Spirey, Edgar Campbell, Elsie McCall, Bertha Walker, Carrie Kimball, and Minnie Boehn, pl't'ffs and Newton L. Ard, Def't, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said Lucinda Brandon personally and as administrator of the estate of Alex Brandon, Edgar S. Brandon, Nettie Spivey, Edgar Campbell, Elsie McCall, as Bertha Walker, Carrie Kimball, Minnie Boehn, by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, *and* then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

97 the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and pleadings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the United States, the 14" day of December, in the Year of our Lord, One thousand Nine Hundred and Nine.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States, District of Kansas.

Allowed.
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 14673. Lucinda Brandon *et al. vs.* Newton L. Ard. Writ of Error. Filed Dec. 14, 1906. D. A. Valentine, Clerk Supreme Court.

98 The original of the foregoing writ of error was lodged with the clerk of the Supreme Court of the State of Kansas on the 13th day of December, A. D. 1906, and also at the same time and place a copy thereof for the defendant in error, Newton L. Ard, one of said copies being addressed personally to said defendant in error. The following endorsement was made upon said original writ and upon each copy: Writ of error. Filed December 13, 1906. D. A. Valentine, Clerk Supreme Court.

99 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Newton L. Ard, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Kansas, wherein Lucinda Brandon, personally and as administratrix of the estate of Alexander Brandon, deceased, Edgar S. Brandon, Nettie Spirey, Edgar Campbell, Elsie McCall, Bertha Walker, Carrie Kimball and Minnie Boehn, are plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas, this 13 day of December, 1906.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

IOLA, KANS., *Dec. 15th*, 1906.

I, Attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

EWING, GARD & GARD,
Attorneys for Newton L. Ard.

[Endorsed:] 14673 In the Supreme Court of the State of Kansas Lucinda Brandon *et al. vs.* Newton L. Ard, Def't in error. Citation Filed Dec. 21 1906. D. A. Valentine, Clerk Supreme Court.

100 Supreme Court.

STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 13th day of December, A. D. 1906, in the above entitled cause,

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant in error, and one to file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 8th day of January, A. D. 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

101 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Kansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court in the City of Topeka, this 8th day of January, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 20,579. Kansas supreme court. Term No. 236. Lucinda Brandon, personally and as administratrix of the estate of Alexander Brandon, deceased, *et al.*, plaintiffs in error, *vs.* Newton L. Ard. Filed February 18, 1907. File No. 20,579.

No. 23 24.

IN THE

SUPREME COURT OF THE UNITED STATES.

NUMBER 20,579.

Office Supreme Court, U. S.
FILED.
FEB 25 1908
JAMES H. McKENNEY,
Clerk.

LUCINDA BRANDON, PERSONALLY AND AS ADMINISTRATOR OF THE ESTATE OF ALEXANDER BRANDON, ET AL., PLAINTIFFS IN ERROR,

VS.

NEWTON L. ARD, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR.

J. A. Pollock

L. W. KEPLINGER,
Attorney for Brandon.

IN THE

SUPREME COURT OF THE UNITED STATES.

NUMBER 20,579.

LUCINDA BRANDON, PERSONALLY AND AS ADMINISTRATOR OF THE ESTATE OF ALEXANDER BRANDON, ET AL., PLAINTIFFS IN ERROR,

VS.

NEWTON L. ARD, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This is an action brought by Alexander Brandon in May, 1887, in the District Court of Allen County, Kansas, for the recovery of the possession of the northeast quarter of Section 11, Township 26, Range 20, in Allen County, Kansas.

Brandon recovered. Ard appealed. The judgment was affirmed, (43 Kans., 424). Ard again appealed to this court where the case was reversed (15 S. C. R., 406). The case was again tried in the District Court of Allen County, where judgment was rendered in favor of Ard. Brandon appealed to the Supreme Court, where the decision of the Supreme Court was affirmed. Brandon having died, plaintiffs were substituted as plaintiffs and they now appeal.

The land in controversy is an odd section within the indemnity limits of the two roads provided for in the land grant act of March 3, 1863, and the branch provided for in the act of July 26, 1866.

Stated in chronological order the facts are as follows:

1. The land grant act of March 3, 1863.

2. Upon the passage of the granting of act of March 3, 1863, and prior to the definite location of any of the roads or branches therein provided for, the senators and representatives in Congress from Kansas, requested the withdrawal of the lands, along the probable lines and routes of the railroads and branches named in that act, for the benefit of such grant. Thereupon the commissioner of the general land office, on March 19, 1863, forwarded to the local land officers, a diagram showing the probable lines of said roads and branches, with directions to withhold from sale or location and also from preemption and homestead entry, with the qualification therein indicated, all the odd sections within their respective districts, and lying within ten miles on either side of such probable lines. This order of withdrawal was approved by the Secretary of the Interior April 20, 1863, and was received by the Register and Receiver at the Humboldt office on May 5, 1863, and by its terms became effective upon such receipt. (Record p. 35). This order included the land in question. (p. 37).

3. July 14, 1866, Ard settled upon 160 acres consisting of the 80 acres in question, the same being in an odd section and 80 acres in the adjacent even section and applied at the local land office to homestead the same, but was refused and was told that the land was in the granted limits and was double minimums land. He thereupon made a preemption filing on the even

section 80 (Record p. 16 and 17), upon which most of his improvements were located. (27). He did not at the time intend to preempt the 80. (pp. 19, 20, 21, 22).

3½. Act of July 26, 1866, enlarging the prior grant.

4. The line of the M. K. & T. Railway Company was definitely located Dec. 6, 1866. (p. 39). The lines having been definitely located, the land in question was found to be within the indemnity limits.

4½. Withdrawal of March 19, 1867, under act of July 26, 1866, (not in record); also withdrawal of April 30, 1867, under act of March 3, 1863. (Record p. 50). The land in question was found to be within the indemnity limits of both roads. (Record p. 6).

5. In June, 1867, Ard went to the local land office and sought to change his preemption filing on the even section 80 into a homestead filing upon the entire 160, but was informed that the land had been withdrawn. (p. 22).

6. The land was selected by both companies as indemnity land August 8, 1872, but was certified to the State of Kansas for the M. K. & T. Co. April 10, 1873, under the act of March 3, 1863. (Record p. 6 and recitals in patent to M. K. & T. Ry. Co., p. 5 and p. 41).

7. Patent from State of Kansas to M., K. & T. Ry. Co., May 14, 1873.

8. In 1873 N. L. Ard and others organized a Settlers' Protective Association for the purpose of testing title in the courts of lands patented to railroad companies including the lands in controversy, of which organization Ard was an active worker. (p. 42).

9. In 1884 Brandon contracted with the railroad com-

pany for the purchase of the land in question (p. 6) on annual payments. He completed his payments and got his deed in December, 1888. (p. 42).

10. November 19, 1886, suit was brought in the U. S. Circuit Court for the District of Kansas against the M. K. & T. Ry. Co. for the cancellation of patents to the even numbered sections within the original ten mile limits of the L. L. & G. R. R. and within the indemnity limits of the M., K. & T. Ry. Co., which roads are the two roads provided for in the act of March 3, 1863.

Also for the concellation of patents to the even sections within the common indemnity limits. (6-47).

11. The act of March 3, 1887, providing for the bringing of suits by the United States to settle railroad land grant titles.

12. October, 1891, decision by the Supreme Court of the United States in said case against M. K. & T. Ry. Co. on demurrer to bill. (12 S. C. R., 13).

13. May 27, 1893, third amended bill of complaint in said case of *United States* v. *M. K. & T. Ry. Co.* filed, extending said suit so as to cover odd sections within common indemnity limits, including land in controversy and making Brandon a party. (Record pp. 6 to 15 inclusive and p. 48).

14. December 19, 1900, land in controversy patented to Ard. (p. 49).

15. Final decree in case of *U. S.* v. *M. K. & T. Ry. Co.* confirming report of master and dismissing bill as to land in controversy. (pp. 34-35).

The petition of plaintiff in error in the Supreme Court of Kansas, among other assignments of grounds for reversal contained the following:

5. "And plaintiffs in error complain of said judgment and orders in this, that in said action, and in the trial thereof, there was drawn in question the validity of the authority exercised under the statutes of the United States, under which the suit in the United States Circuit Court mentioned and referred to in the evidence introduced in said cause, was instituted and under which said suit was prosecuted. And the court in the rendition of said judgment and in the making of said orders, disregarded rights which plaintiffs had and to which they were entitled under such statute and under the judgment rendered in said action, in the United States Circuit Court, which was instituted and prosecuted under and by virtue of said statutes.

6. The judgment in this action which is now sought to be set aside is a decision against a right claimed by plaintiffs in error, under the United States Statute, by authority of which the case of the *United States* v. *The Mo. Kansas & Texas Railway Co., et al.*, mentioned in the evidence was instituted and prosecuted.

7. That under the Statutes of the United States, under which said action in the Federal Court was instituted and prosecuted, the title and right of plaintiffs in error, which is now asserted by them conclusively established, both as against the United States, and as against the defendant in error, which fact the decision of the court below, by necessary implication ignores.

QUESTIONS INVOLVED.

1.

Whether the final decree rendered in the case of *U. S.* v. *M. K. & T. Ry. Co., Brandon, et al.*, dismissing the bill filed by the

government to cancel the patent under which Brandon claims title because of the equities of Ard which are sought to be asserted in this action, constitute *res adjudicata* in Brandon's favor in this action.

2.

Whether or not the provisional withdrawal of March 19, 1863, which was prior to the time Ard made his settlement withdrew the land in question from the category of "public lands," within the meaning of those words in the homestead and preemption acts.

3.

Whether the withdrawal of March 19, 1863, was a "reservation by order of the president," within the meaning of the word "reservation" as found in the homestead and preemption act.

4.

Whether the land grant act of March 3, 1863, was such as to place it beyond the power of the land department to make the withdrawal of March 19, 1863.

5.

Whether or not the rulings of the land department authorizing, and decisions of this court recognizing such withdrawals prior to the time Brandon purchased the land in question, became a rule of property such as would protect Brandon in a purchase made in reliance upon such rulings and decisions.

6.

Whether the decisions under the Northern Pacific grant in *Nelson* v. *Northern Pacific,* 188 U. S., 108, and *Hewitt* v. *Schultz,* 180 U. S., 139, are applicable to the withdrawal under act of March 3, 1863.

SPECIFICATIONS OF ERROR.

First.

The court erred in refusing to consider the decision in *U. S.* v. *M. K. & T. Ry. Co., Alex Brandon, et al.,* as conclusive in Brandon's favor.

Second.

The court erred in holding that the withdrawal of March 19, 1863, was ineffectual to withdraw the land from the class of lands subject to homestead and preemption and in holding that Ard acquired equities by his settlement, as against Brandon.

Third.

The court erred in affirming the judgment of the trial of the court denying Brandon's right to recover.

BRIEF OF ARGUMENT.

1.

The relations between the government and Ard with respect to this land and Ard's relation to and connection with the suit were such as to render the decree in the case of *U. S.* v. *M. K. & T. Ry. Co.*, conclusive against Ard as to the equities now claimed by him. Record p 34

Graham v. *Great Water Power Company*, 76 Pac., 811;
Norton v. *Evans*, 82 Fed., 804;
Kerrison v. *Stewart*, 93 U. S., 155;
Manson v. *Duncanson*, 17 S. C. R., 647;
Freeman on Judgments, (3d Edition) Sec. 147;
Black on Judgments, Sec. 85;
Hornsly v. *National Bank*, 60 S. W., 180;
24 Ency. Law, 2d Edition; 737-8
Hanke v. *Cooper*, 108 Fed., 738, 924;
Thaller v. *Hershey*, 89 Fed., 576;
U. S. v. *Beebe*, 8 S. C. R., 1083;
(Government a Trustee.)

That Ard could have appealed.

3 Daniels, c. l., 6 Edition, start page 1461;
Sage v. *Central Railroad Co.*, 93 U. S., 412.

2.

The withdrawal of March 19, 1863, withdrew the land in question from the category of public lands.
Record p 35

Northern Lumber Co. v. *O'Brien*, 134 Fed., 303; 139 Fed., 614;
27 Supreme Court Reporter, 250;
Wood v. *Beach*, 156 U. S., 548;
Spence v. *McDougal*, 159 U. S., 62;

Merrill v. *Chi. Ry. Co.*, 70 Fed., 464;
U. P. Ry. Co. v. *Atchison, etc. Co.*, 13 Fed., 106;
Wolcott v. *Des Moines Co.*, 5 Wall, 681;
Wilcox v. *Jackson*, 13 Peters, 498;
Leavenworth, etc. v. *U. S.*, 92 U. S., 745;
R. R. Co. v. *Freeman Co.*, 9 Wall., 94;
Dissenting opinion of Judge Brewer in *Nelson* v. *Northern Pacific R. Co.*, 188 U. S., 108.

3.

The withdrawal of March 19, 1863, withdrew the land from the category of "public land" within the meaning of the words as used in the homestead preemption acts and such withdrawal constituted a "reservation" within the meaning of said word as contained in said act. Same authorities as above.

Patterson v. *Tatam*, 3 Sow., 164;
Wolsey v. *Chapman*, 101 U. S., 770;
Weaver v. *Fairchild*, 50 Cal., 560;
Vicksburg v. *Elmore* 8 So., 727.

4.

The rulings of the land department authorizing the decisions of this court sustaining withdrawals such as the one in question, and made prior to the time Brandon made his purchase constitute a rule of property in his favor. See cases cited in 13 Century Digest, c. c., 2163, Sec. 336, and such rule having been established by federal authority, it is the legal duty of the government to uphold the title so acquired.

SYNOPSIS OF ARGUMENT.

1. The government owns the public land merely as trustee for the people, and its powers as such trustee are limited only by its own will.

2. Whether the withdrawal of March 19, 1863, was void or valid, Ard's settlement gave him no vested rights as against the trustee.

3. In bringing the suit to enforce Ard's equities as against the patentee, the government was acting in its governmental capacity in discharge of its duties as such trustee and in so doing, as to all persons it saw fit to make parties it was the representative of the beneficiary and that too without regard to Ard's will or consent.

4. That the result of that suit placed the government under an obligation to Brandon which was superior to such inferior and non-legal obligation as it owed to Ard by reason of his settlement, and that too even though the withdrawal of 1863 were conceded to be invalid.

5. That such obligation was of a governmental character and when a state court accords to the rights of Ard, superority over the rights of Brandon, a federal question is presented.

6. Brandon having been compelled by an exercise of governmental authority to litigate, and such governmental action having been procured by Ard, a different case is presented than in cases where one private party sues in his own name at the instance of another, and for the latter's benefit, since in the latter case the right of the nominal plaintiff could be successfully

challenged. And for this reason whether or not Ard should be bound by the result of governmental action so procured by him is a federal question.

7. Ard can only have such rights as he acquires from the government, and having no legal vested right as against the government at the time the government brought suit against Brandon for the enforcement of Ard's rights, he can only have such rights against the government as he may have acquired since the beginning of that suit. But as to all rights acquired from the government subsequent to the bringing of the suit he is by the ordinary rule of estoppel bound by the result of that suit.

8. That when grants of public lands are made by the legislative department, with a view to securing the construction of railroads, the executive department in the absence of affirmative provisions indicating a legislative intent to the contrary, may make withdrawals of public lands so as to prevent the defeat of the grant by homestead and preemption entries between the date of the grant and the time when the right of the railroad company would have attached but for such entries.

9. That action taken by the executive department not in violation of express statutory provisions, by long acquiescence on the part of the other departments, acquires a basis not less stable than if expressly sanctioned by the legislative department, and the withdrawal of March 19, 1863, was of this character.

10. That the usages of the land department with respect to withdrawals and the decisions of this court recognizing such withdrawals, and the failure of Congress, though having full knowledge of the fact, to forbid such withdrawals in successive land grants, all of which occurred continuously during many years prior to the time Brandon made his purchase, constitutes

a rule of property in his favor, and such rules of property having been established by federal authority, it follows that a disregard of such rule by a state court presents a federal question.

11. That the controlling purpose which influenced the Northern Pacific land grant was either not at all, or if otherwise it was a minor consideration, in the passage of the land grants now under consideration, and the conditions were radically different and for that reason the Northern Pacific land grant act contains important affirmative provisions which are not found in the land grants now under consideration and the decisions in the Northern Pacific cases are avowedly based upon such provisions, and for that reason such decisions have no bearing upon the question now before this court.

12. That whether the withdrawal of March 19, 1863, was authorized or not Ard's settlement having been made in defiance of long established rules the government was under no moral obligation to augment his incipient rights into a vested interest at the expense of Brandon, who purchased in reliance upon such rules.

13. *Ard's equities are insufficient unless they are such as to entitle him to legal title and the patent he has heretofore obtained is a nullity. When he again applies for a patent Brandon may rightfully object and say to the government: "You have no right to issue Ard a patent based upon his equities against me, for in a suit in which you compelled me to litigate with you that precise question, I have secured a judgment against you establishing the fact that he has no equities as against the patent you have already given me."*

ARGUMENT.

II.

Was the decree in *U. S.* v. *M. K. & T. Ry. Co.*, conclusive in Brandon's favor?

This question is to be determined not as in ordinary cases, by looking to the record to see who were parties, who procured suit to be brought or who participated in its prosecution or who may have the right of appeal. A broader view should be taken.

We claim this: the relation of the government to the public lands is that of a quasi-trustee. Such relationship is an incident of sovereignty and that suit was brought by the government in discharge of its duty as such trustee without any authority from Ard. This trustee had all the authority Ard could have conferred upon it. Otherwise Brandon might have ignored its suit to establish Ard's rights. Such trustee stands on a different footing and has far ampler powers than in case of trustees created by contract between private parties. The bringing of that suit was a governmental act. As such trustee the government is "invested with such powers and subjected to such obligations that those for whom it holds will be bound by what is done against him as well as what is done by him."

Kerrison v. *Stewart*, 93 U. S., 155.

More especially is that so when as in this case, such governmental action has been taken through the procurement of the beneficiary himself. The action of the Settlers' Protective

Association was the act of Ard. He induced the trustee to bring the action in its governmental capacity, to institute the action in its name, but exclusively in his own interest. The government, at the instance of Ard, having subjected Brandon to the burden of defending his title against the government's assertion of Ard's rights, is now under a governmental duty to protect Brandon from further annoyance.

And more especially should the trustee be held to be the representative of Ard in a case like this where the beneficiary has no vested rights as against the trustee. *Graham* v. *Great Water Power Co.*, 76 Pac., 811; *Norton* v. *Ennis*, 82 Fed., 804, and the trustee was consequently at full liberty to assume such powers not only as to the suit but as to the disposition of the title, as it saw fit, without any regard to the wishes of the beneficiary.

The facts are these: The act of March 3, 1863, provided for a main line extending north and south and a branch line extending northwest. The land in question is east and a little north of the point where the branch diverges to the northwest.

The act of July 26, 1866, though in form providing for a separate and distinct road along the line of the branch, provided for in the prior act, was a mere enlargement of the prior grant.

See Brewster case, 7 S. C. R., 66, 118 U. S., 682. After the withdrawal of 1863 which applied to odd sections only, Ard settled upon and claimed 160 acres consisting of an even section 80 and an odd section 80 lying adjacent and within the indemnity limits of both roads.

The Settlers' Protective Association of Allen County was

organized in 1873. The object of the Association was to take such legal steps as might be necessary to test the title in the courts of the various lands in Allen County, which had been patented to the Railroad Company, including the land in question. Ard was an active member of this organization. (p. 42). Some time thereafter Brewster, attorney general, brought suit against the K. C. & L. S. K. Ry. Co. (since M. K. & T. Ry. Co., see 8 S. C. R., p. 67) for the cancellation of patents to all indemnity lands, odd as well as even, certified to the state for that company. The suit was brought upon the theory that the company must rely exclusively upon its rights under the act of July 26, 1866, but the company relied upon the act of 1863 and the court refused to concel the patents. (7 S. C. R., 67).

Through the efforts of this organization, the case of *U. S.* v. *M., K. & T.* was instituted (p. 43). That suit was instituted in November, 1886, several months prior to the passage of the act of March 3, 1887. (p. 6). The suit as originally instituted was for the cancellation (1) of patents to even sections in the ten mile limits, (2) even sections in the indemnity limits which would include Ard's even section 80 only. See *U. S.* v. *M. K. & T. Ry. Co.*, 12 S. C. R., 15, and record p. 48. The fact with respect to the institution of this suit will appear in the communication from the secretary to the attorney general under date of June 10, 1886, 4 Dec. Dep. Int., 573.

The failure of the secretary to request that the suit include also the odd sections within the indemnity limits was no doubt due to the fact that the odd section indemnity lands had been withdrawn prior to any settlements and such withdrawal (that of March 19, 1863,) was regarded as valid. And no question had ever been raised as to the validity of that withdrawal. Af-

ter the passage of the act of March 3, 1887, for adjustment of land grants, the bill was amended to conform to that act. See statement of case, 12 S. C. R., 14.

In May, 1887, this suit was instituted in the District Court of Allen County. (p. 3). Thereafter judgment having been rendered in the favor of Brandon, the case was appealed to the Supreme Court which affirmed the judgment of the court below. (43 Kas., 426). The case was appealed to this court where the judgment of the Kansas Supreme Court was reversed. (15 S. C. R., 407). As then presented *the fact that this land was included in the withdrawal of March* 19, 1863, *was not shown.* (p. 43).

The case of *United States* v. *M., K. & T., et al.*, came up on demurrer to the bill which was sustained. (12 S. C. R., 18). The decision overruled all objections to the patents for the indemnity lands, save and except such as were based upon the ~~illegal~~ alleged equities of settlers who were claimed to have made settlement prior to the time the rights of the railroad company attached. Thereafter, in part at least, through the efforts of said Settlers' Protective Association, the bill was amended so as to include also Ard's odd section indemnity, being the land in question, and Brandon was made a party. (p. 48). It will be observed the right of the government to maintain a suit for the cancellation of these patents did not depend exclusively upon the act of March 3, 1887. The right to bring this suit so far as this land is concerned was not conferred by the act of March 3, 1887. It was only recognized, regulated and the scope of the suit enlarged. So far as this land is concerned it had a footing entirely independent of that act.

U. S. v. *Beebe*, 8 S. C. R., 1083.

The amended bill alleged that the applications of Ard to make entry were refused on the mistaken ground that the land had been withdrawn. It further alleges that such mistake was both of law and fact. The withdrawal referred to could only have been that of March 19, 1863, because that was the only withdrawal which had been made at the time of the refusal. On the hearing Ard testified as to his alleged equities and was examined by an attorney who had been employed by the Settlers' Protective Association to assist the attorney general. (p. 43). The master, to whom the case was referred, found the fact as to the withdrawal of March 19, 1863, as well as other facts which he considered fatal to the claim made on behalf of Ard, and as a conclusion of law found that Ard had no equitable rights as to either 80 and that the government had no cause of action to disturb the title conveyed by the patents. (p. 33). The decree sustained objections to the findings of the Master as to the even section 80, but overruled such exceptions, confirmed the report and dismissed the bill so far as related to the land now in question.

We claim this decree to be conclusive in Brandon's favor. But for Brandon's rights, the government was the absolute owner of this land and could have disposed of it as it saw fit, even though all the facts alleged by Ard were conceded to be true. He had no vested right as against the government. *Graham* v. *Great Water Power Co.*, 76 Pac., 811; *Norton* v. *Ennis*, 82 Fed., 804. See full discussion with citation of previous cases.

At the time of the passage of the act of March 3, 1887, instead of passing that act, Congress might have passed an act providing for a sale of this land to Brandon or to anybody else.

The power to do the greater included the power to do the less. Instead of doing the greater and ignoring Ard's alleged equities, Congress saw fit to pass a law recognizing and regulating and enlarging the scope of the action which the attorney general had already the right to bring for the cancellation of patents, because of the prior equities of settlers, in which the question as to the existence of such equities could be determined by due course of law. The proceeding thus recognized was to be conducted by the government without expense to the settler and would be quite as likely to result in a determination of the facts as to his alleged equities as would any suit instituted and prosecuted by himself. Instead of conveying the land to Brandon regardless of his equities, as it might have done and without regard to his wishes, it saw fit to make Brandon's title dependent upon the result of such a proceeding. Wherein then was the validity of Brandon's title affected by the fact that Ard was not a party to that suit? As shown by the authorities above cited, the government might have disposed of this land without notice to Ard, without any suit and without regard to his alleged equities. Why could it not confirm Brandon's title after a full investigation conducted in such way as would be most likely to result in a determination of the facts, had shown that Ard had no equities, even though Ard were not a party to the proceeding?

The court below in its opinion says the M. K. & T. case was brought in obedience to the act of March 3, 1887, and not through procurement of Ard. But we look to the record rather than to the opinion, for the facts. It was the Settlers' Protective Association of which Ard was an active member that caused the suit to be brought months before the act of March 3, 1887, so far as relates to the even section 80 claimed by him.

(p. 6). And it was the Settlers' Protective Association which caused the bill to be amended to include the odd section 80 and make Brandon a party (p. 48). And that association was organized for that very purpose. Also the act of March 3, 1887, did not require any suit to be brought to cancel the patent of this 80. It was only where it appeared that lands "had been erroneously certified or patented" that the secretary was directed to make demand and institute proceedings. As we have seen Secretary Lamar in his letter to Attorney General Garland, of June 16, 1886, recommending the suit to cancel patents to Ard's even section 80, made no such recommendation as to the adjoining odd section 80. In the light of the express facts stated in page 48, that odd sections were not included in the original bill, we are justified in saying that it was through the active efforts of the Association that the secretary was induced to change his mind and extend the scope of the bill to include the odd sections.

Long prior to the act of March 3, 1887, this court had been holding that the government had the right to institute suits to cancel patents in cases where settlers had prior rights. So far as the suit related to this land, the existence or non-existence of such equities was the sole issue. The court below was in error in its opinion in stating that Ard's "equitable claim to the land was not involved and could not be determined." That was the precise question and the only question that was determined. The government in the Brewster case, 118 U. S., 682, had already unsuccessfully asserted such rights as it had. The patentee had already been subjected to the annoyance and expense of defending its title through all the courts against such claim as the government could make on its own account to this

identical 80. (Brewester case). And it now comes forward as champion of Ard's rights. The M. K. & T. case, 12 S. C. R., 21, shows that it always had and frequently exercised its right to prosecute "suits" for such purposes. Says the court: "A suit for that purpose * * * was required by the duty of the government." And it cites *U. S.* v. *Beebe*, 127 U. S., 338, which says the proper procedure is by bill in equity. Now these decisions use the word "suit" in its ordinary legal sense. And what is a suit? A proceeding is not a "suit" wherein the decision of the sole issue against him would not be conclusive unless a determination the other way would be conclusive in his favor also. Suppose the decree relied on in this case had been in favor of the United States, would not the decree against Brandon have been conclusive against him in this action? The question whether the decree shall be *res adjudicata* is not as in ordinary cases to be determined by confining attention to the record to see who were parties, who participated in the proceedings and who might appeal. A broader view must be taken. The relative rights of the parties and especially the fact that the United States was the absolute owner as against Ard, the capacity in which ~~they~~ it acted and more especially the purposes of the suit, must be looked to. Whether the withdrawal was valid or not Ard had no vested right. The government could do as it pleased without notice to him and without giving him any right of appeal. The passage of the act of March 3, 1887, might have disposed summarily of these alleged equities. The institution of that suit was a governmental act. The government did not appear as a property owner. It did not appear as an ordinary litigant to assert a property right. It appeared in its sovereign capacity in discharge of possibly a

moral, but not a legal obligation, which it owed to Ard. It was just such a proceeding as would be best calculated to result in a determination of the question whether Ard had equities as claimed or not. Ard could have interposed no legal objection if the government had seen fit to dispose of his alleged equities without any investigation and without any notice. Neither can he make any legal objection if it sees fit, without notice to him to make a recognition of such equities depend upon the result of a full legal investigation conducted by itself without notice to Ard.

It was the manifest purpose of the act of March 3, 1887, that the proceedings therein provided for should end all controversies. But independent of that act it was the duty of the government to institute this suit. Prior to this suit Ard had no vested right as against the government. When the government called Brandon into court, subjected him to the expense of defending his title and was beaten, it then became under a legal obligation to Brandon. After that decree was rendered Brandon succeeded to every right which the government theretofore had with respect to this land. Congress had required the government to prosecute a suit against Brandon in which Brandon's absolute ownership of this land was the sole issue and Brandon had won. Prior to that suit Ard had no vested right against the government. That decree rendered as it was in a suit which had been brought pursuant to an act of Congress, placed Brandon in the shoes of the government with respect to this land. That decree sanctioned as it was by an act of Congress was in the nature of a withdrawal of the land from the operation of the homestead law. The right which Brandon acquired against the government by the decree rendered in the suit which

Congress had required the government to prosecute against him was but another name for the obligation which that decree imposed upon the government toward Brandon. Such obligation was inconsistent with any distinctive right which Ard had as against the government to perfect his title under the homestead act. That Ard never did have a vested right see 76 Pac., 811, *Norton* v. *Evans*, 82 Fed., 804, 105 Fed., 44.

In considering the effect of a suit brought under act of March 3, 1887, and the rights of Ard, at the time that suit was brought, *Norton* v. *Evans*, 82 Fed., 804, will be found most pertinent and instructive. In that case a patent had been issued to a railroad company in disregard of the prior rights of an attempted settler. The controversy arose between a purchaser from the railroad company and the settler. The court, Brewer, J., says:

"His contention is, however, that he had tried to enter the land, had a right to enter it, that his application was erroneously refused by the local land officers, that he had sought to settle upon the land, and had been prevented therefrom by the wrongful acts of one of the defendants, that all this took place before the passage of the act of 1887, and that thereby he had acquired a vested right in the land, which even Congress could not take away. He refers to *Ard* v. *Brandon*, 156 U. S., 537, 15 S. C. R., 406, as authority for the proposition that he could not be deprived of any rights by the wrongful acts of the local land officers, and insists that therefore the case must be treated as though he had actually made a homestead entry, and had acquired such a right in the land as was beyond the reach of Congress to disturb by subsequent legislation, and concludes therefrom that the act of 1887 has no application to his case. We are unable to agree with this contention. He is in no better position than if he had been allowed by the local land office to make the entry. Such entry creates no vested rights as against the United States, and does not interfere with the pow-

er of Congress by subsequent legislation to dispose of the land. *Frisbie* v. *Whitney*, 9 Wall., 187; The Yosemite Valley case, 15 Wall., 77; *Buxton* v. *Traver*, 130 U. S., 232, 9 Sup. Ct., 509; *Campbell* v. *Wade*, 132 U. S., 34, 10 S. C. R., 9. See also *Winona & St. P. R. Co.* v. *U. S.*, 165 U. S., 463, 17 S. C. R., 381. The decree of the Circuit Court was right and is affirmed."

Opposing counsel cite authorities to sustain the general proposition that in order to render one privy to a judgment against another the alleged privy's succession to the property "must have taken place after the bringing of the action in which judgment was rendered." If Ard is ever to succeed to the rights of the party against whom Brandon recovered judgment, such succession must be subsequent to the time of the bringing of the suit in which suit judgment was rendered, since under the authority of the case just cited he had no legal right against the government at the time that suit was brought. Before that suit was brought and decree rendered, the government might have suffered such incipient rights as Ard may have acquired by his settlement, to ripen into a legal right, but after that decree was rendered it was for Brandon rather than for the government to so permit. It was Brandon rather than Ard who succeeded to whatever right the government had with respect to this land at the time of the bringing of the M. K. & T. suit. The authority to bring suit against Brandon which the government undoubtedly had before as well as after the act of March 3, 1887, was authority for the government to lose to Brandon every right it had with respect to the land. Every decision upholding the right to maintain suit is directly in point upon the proposition that the decree is *res adjudicata* in Brandon's favor.

It may be that if Ard had vested rights as against the

government, no judgment he Brandon could recover against the government to which Ard was not a party and with which he had no connection could cut off Ard's vested rights. But when the government against whom Ard has no vested rights calls Brandon into court and litigates with him and is beaten, a very different question is presented. Brandon has beaten the only party who had any legal claim to this land at the time the suit was instituted and when he has done that he is entitled to immunity from further vexation. And more especially is this so when the only issue in the case in which such judgment was rendered was as to whether Ard had the very equities against Brandon which are now claimed.

In the M. K. & T. suit, the position of the government whether acting by virtue of the act of March 3, 1887, or independent of the act was analagous to that of a trustee for Ard. That Ard may not have delegated such authority is wholly immaterial although in fact and as the record shows he induced the government to institute the suit. So far as this land was concerned Ard was to be the sole beneficiary of a successful result. The case comes within the principle involved in *Kerrison* v. *Stewart*, 93 U. S., 155:

"It cannot be doubted that under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subject to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, *Shaw* v. *R. R. Co.*, 5 Gray, 171; *Bifield* v. *Taylor*, 1

Beat, 91 (1 Molloy, 193); *Campbell* v. *R. R. Co.*, 1 Woods, 376; *Ashton* v. *Black*, 3 Allen, 220 or to one by a stranger against him to defeat it in whole or in part. *Rogers* v. *Rogers*, 3 Paige, 379; *Wakeman* v. *Grover*, 4 Paige, 34; *Winslow* v. *R. R. Co.*, 4 Minn., 317; *Campbell* v. *Watson*, 80 Ohio, 500. In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bond holders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analagous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconveniences.

"Undoubtedly, cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. They then become proper parties and may be brought in or not, as the court in the exercise of its judicial discretion may determine. But this was very clearly not a case in which such action was required, and so all the parties evidently thought, while the litigation was progressing. The trustee as well as Kerrison & Leiding, appeared and vigorously resisted the decree asked for. The report of the case in *Stewart* v. *Kerrison*, 3 Rich. (N. S.) 266, to which we have been referred, shows that they were represented by the same counsel who appear here for the creditors, that the argument was full and the judgment carefully considered."

See also *Manson* v. *Duncanson*, 17 S. C. R., 647.

The Supreme Court of Kansas in its opinion says Ard had no control over any issue in the case. But the only issue so far as this land was concerned was as to the equities between himself and Brandon and he himself caused the government to raise the issue, Long before the act of March 3, 1887, was ever though of

this court had held it to be the duty of the government to institute such suits. And it was Ard who induced the government to the performance of this duty. He himself caused this identical issue to be presented. And not only so, but he employed Mr. Crane to assist in the prosecution of the suit, (p. 43), and it was Mr. Crane who examined Ard when testifying as to the equities claimed by him. (p. 15).

The court further says:

"The action was one to determine the right of the railroad companies to hold the legal title to those lands as against the United States." Not so, precisely that was the precise object of the suit of *Brewster, Atty. Genl.*, v. *The K. C. & L. S. K.* (now M., K. & T. Ry. Co.) 118 U. S., 682, and it was determined that the railroad company did hold the legal title to this identical 80 acres as against the United States. The court proceeds:

"Ard was not made a party because his equitable claim to the land as against the railroad company was not involved and could not be determined."

Now every question with respect to this land was determined adversely to the government in the Brewster case, save and except the question as to Ard's equities and as to those the bill in the M. K. & T. suit alleged settlement by Ard, but that the officers of the local land office unlawfully refused to permit said Ard to make proof of settlement on the mistaken ground that said lands were "now within the ten mile or granted limits and had been withdrawn." Now, if Ard's equitable rights with respect to this land "were not involved and could not be determined," under such allegations, what was it that was involved and what

was it that could be determined? Again, "the United States was not interested in the litigation pending between Ard and Brandon involving their rights to any particular tract of land." That may be but nevertheless the United States in this suit which was instituted through the procurement of Ard, did in fact manifest a very lively interest in this very suit now pending and makes mention of it specifically and states that it was then pending in this court on appeal. (p. 11). This was in fact an attempt to enjoin Brandon from further prosecuting this "litigation pending between Ard and Brandon," in which opinion says the United States was not interested.

It was therefore the manifest object and purpose of Ard to have this suit which he procured to be instituted, be the suit in which the controversy pending in this action should be determined. And such also was the purpose of the government itself. The prayer of the bill was that the patents should "be brought into this honorable court to be there delivered for cancellation, and that defendants be enjoined from setting up any claim of title or right either in law or equity to any of said lands." It therefore clearly appears that whatever may be claimed now, it was the intention of Ard and the government that the issues between Ard and Brandon in this case should be determined in that case and the prosecution of this case should be stayed and that the decision in that case should be conclusive.

The pendency of this suit was alleged in the answer in abatement, (p. 14) but the views and purposes of the complainant and Ard prevailed and the case was determined on its merits. Had the decision been the other way, the patent would have been delivered up and cancelled and the parties including Brandon would have been enjoined from further prosecuting

suits against settlers claiming prior equities and Ard would have dismissed his prior appeal to this court, (15 S. C. R., 410) if the decree in the M., K. & T. case had been rendered before the case of *Ard* v. *Brandon* was reached in this court.

"Whenever one has an interest in the prosecution or defense of an action and he in the advancement or protection of such interest openly takes substantial control of such prosecution or defense, the judgment recovered therein is conclusive against him to the same extent as if he were the nominal as well as the real party to the action."

Freeman on Judgments, (3rd Ed.) Sec. 174.

The record clearly shows that as to this land Ard did have substantial control.

"A suit prosecuted and defended in good faith by a trustee for the beneficiaries with their knowledge and consent or more particularly at their request will be conclusive upon their interest in the result."

Black on Judgments, Sec. 585.

"A suit prosecuted and defended in good faith by a trustee for the beneficiaries with their knowledge and consent is conclusive in its result on them."

Hornsby v. *National Bank*, 60 S. W., 160.

"One who prosecutes or defends a suit in the name of another to establish or protect his own right or who assists in the prosecution or defense in and of some interest of his own and who does this openly to the knowledge of the opposing party is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adversary as he would be if he had been a party to the record."

24 Ency. Law, 2nd Edition, p. 738.

"The law is well settled that parties and privies include all who had the right to make defense, control the proceedings,

examine and cross-examine witnesses and appeal from judgment."

Theller v. *Hershey*, 89 Fed., 576;
Hanke v. *Cooper*, 108 Fed., 924.

Though not named as a party one who prosecutes the institution of a suit in the name of another and who employs counsel to assist in its prosecution especially when as in this case such fact was known to the other party is bound by the result. "A person who actively prosecutes the action is bound by the judgment though not technically a party thereto." *Stoddard* v. *Thompson*, 31 Iowa, 80, also *Bachelder* v. *Brown*, 11 N. W., 200, *Wood* v. *Ensel*, 63 Mo., 193, is exactly in point.

The court says:

"In an action to recover specific personal property plaintiff's own testimony shows that he was an active participant in a former action respecting the same subject matter and that he claimed the property in dispute as his own, appearing as a witness and in the absence of the nominal plaintiff assumed control of the case and employed and paid attorneys to attend to it. Held that the former action was a bar though plaintiff was not made a party to the record thereof."

Our case is far stronger because the federal suit was instituted through the procurement of the defendant.

Also as distinctly in point see 53 N. W., 76.

"Persons on whose behalf and under whose directions a suit is prosecuted or defended in the name of some other person may be bound by the judgment."

Bennett v. *Wilmington Star M. Co.*, 119 Ills., 97 N. E., 498.

"The record of a former action to contest a will is admissible in evidence if there is any evidence that the present plaintiff participated in its management and control though it was prosecuted in the names of other persons."

Shugart v. *Miles*, 125 N. E., 551.

"Where the plaintiff in the present action procured the commencement of the former suit in the name of the plaintiffs therein and filed an abstract of title showing title in them and prosecuted the suit as one of their attorneys and thus procured a final judgment involving the same controversy as in this action he is bound by the result."

Roby v. *Eggers*, 29 N. E., 365.

To same effect see *Baxter* v. *Myers*, 52 N. W., 234. *Shoemaker* v. *Finlayson*, 60 Pac., 50, is strongly in point. The court says:

"The plaintiff in this action was a witness on the trial of the former action and was fully acquainted with the character and object of that action and the issues made therein. He was directly interested in the result and in sustaining the title of his grantee which was assailed therein and under such circumstances he is estopped as fully as if he had been a nominal party thereto."

In *Anderson* v. *Watts*, 11 Sup. Ct., 499, the court says:

"Mr. Davis appears to have been a necessary party and although the plaintiffs did not originally or by an amendment make him a party to their bill, yet the effect of what was done was such as bound him by the decree and we think upon this record he must be held to have become such a person who has not been named as defendant to a bill may appear at the hearing with the consent of all the parties to the cause and in this instance the objection of want of consent cannot be made."

Also as closely in point, 52 N. W., 686-7.

The rule for which we contend will be strongly stated in 1 Greenleaf on Evidence, Sections 522, 523.

"One who is not a party on the record but who participates in the defense and has an interest in the subject matter in controversy in the action and participates in the defense for the protection of such interest and not as representing the interest of the defendant of record and where it is known to the plaintiff

that such party so participates for the protection of his own interest is bound by the decree rendered in the action."

The fact that it was the government that was procured to bring the suit renders this a federal question. If a private party had been procured to do so Brandon could have refused to litigate Ard's equities with him.

That Ard did have control so far as relates to this land is clearly apparent. The Settlers' Protective Association of which Ard was an active member "was organized to take such steps as might be necessary to test the title in the courts, of the Railroad Company to the various lands in Allen County which had been patented to the railroad company, of which the lands in controversy were a part." From time to time said organization employed counsel to *represent the interests of its members in litigation in which* the title of said lands were involved. It was through the efforts of said organization that said suit was instituted. Shortly after the commencement of the suit of the United States against the M. K. & T. Railway Company to set aside the railroad title to said lands of which the lands in controversy were a part; said organization employed Mr. Crane of Fort Scott to assist the attorney general in the prosecution of said suit. Since the year 1885 Ard was the corresponding secretary of said organization." (p. 43). "It was the understanding of Mr. Keplinger who represented Mr. Brandon that Mr. Crane was specially employed to appear and assist the attorney general." (p. 43). It was through the efforts of the Settlers' Protective Association that the bill was amended to include odd sections and to make Brandon a party. (p. 48). Also Ard's interests were fully represented. Under Mr. Crane's examination, he testified as fully as to his alleged equities as he did in

this case. But it is claimed that he did not have the right to appeal. But we say he did have the right to appeal.

"It is not necessary that the person who appeals should be a party to the record provided he has an interest in the question which may be affected by the decree or order appealed from."

3 Daniels, Ch. 6 Edition Star paging 1461;
Jopp v. *Wood,* 33 Beav., 372;
Sage v. *Central Railroad Co.,* 93 U. S., 412.

It would not have been necessary for him to appeal the entire case.

We submit if ever there was a case to which the principle recognized in *Kerrison* v. *Stewart,* 93 U. S., 155, and *Monson* v. *Duncanson,* 17 S. C. R., 647, this is that case. It may be the government is not a trustee in the ordinary technical sense, but it holds the public lands as trustee for the people generally.

"The public domain is held by the government as part of its trust. The government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation and under certain circumstances to invest the individual citizen with the sole possession of the title which till then has been common to all the people as benificiaries of the trust. * * *

"If it should come to the knowledge of the government that a patent has been fraudulently obtained and that such patent if allowed to stand would work prejudice to the interests or rights of the United States or *would prevent the government from fulfilling an obligation incurred by it either* to the public or to an individual, which personal litigation would not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent."

United States v. *Beebe,* 8 S. C. R., 1083.

We have here an authoritative statement as to the basis of the duty in discharge of which the M. K. & T. suit was instituted. The government occupies a trust relation toward this land, by virtue of which it may institute such suits as the interests of the beneficiaries may require and in such suits it is the representative of all the beneficiaries. Its powers are far more ample than that of trustee in ordinary cases whose powers are based upon contract between private parties, and especially is this the case in view of the fact that the particular beneficiary in this case has only such interest as the trustee may see fit to recognize. The trustee has the power to be the representative of the interests of a beneficiary such as Ard was regardless of his wishes and where it deals with third parties on that basis, the beneficiary must be held concluded. It has in fact whatever power it sees fit to assume and for this reason the rule stated in the cases last cited apply with still stronger force to the decree in question.

The fact that Ard was not a party and the fact, if fact it be, that he could not have appealed are wholly immaterial. The statement in *Ard* v. *Brandon*, 15 S. C. R. 408, that "No adjudication against the government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the law, for which the patent was issued," was made with special reference to the Brewster case and was strictly correct because that was a case where the equities of the individual as against the patentee were not involved, but that statement has no application to a case like the present where the supposed equities of the settler was the very question and the only question litigated, and where the government was itself the absolute owner of the land as against the

settler, who had no vested rights. The settler having no legal right as against the government, it was exclusively a question for the government whether he should be accorded any rights at all and if so what rights, and if it saw fit to come forward as his representative it could do so and in such case it would be his representative, with or without his consent, as to the patentee whom it compelled to litigate the question as to the settler's rights. It was none the less Ard's representative because of the fact that it may have been self appointed. The fact that it might debar him absolutely and without any trial involved the power to become a self-appointed representative to institute and carry on litigation to determine his equities, as against a third party, without consulting Ard. And especially would this be so if the suit be regarded as having been brought by authority of the act of March 3, 1887. Instead of confirming Brandon's title, as it might have done, a suit was authorized in which such title might be confirmed. The bringing of suit by virtue of the Act of March 3, 1887, was a legislative disposition of Ard's claim within the meaning of 82 Fed. 806.

It will be claimed that the withdrawal of March 19, 1863, was not intended to withdraw any lands except such as were or would be within the ten mile limits. Be that as it may, there was an intent to withdraw the specific 80 and it was withdrawn.

But there still remains a final consideration, which conclusively establishes the fact that the decree in the M. K. & T. case is conclusive in Brandon's favor. Suppose the present case had been finally determined in Brandon's favor, before the M. K. & T. case had been instituted, would the fact that Ard was not a party to the M. K. & T. case have prevented the supposed judgment in the State Court from being conclusive against Ard

in the case in the Federal Court? This specific question was presented in *United States* v. *Des Moines Valley R. R.*, 84 Fed. 42. This was a suit brought by the attorney general. The court says:

"The Circuit Court reached the conclusion—in which view we fully concur—that this action was brought for the sole purpose of quieting the title to a specific tract of land, which is claimed on one hand, by the defendant Fairchild by virtue of his homestead entry, and on the other hand by the defendant West by virtue of the certification of the land to the State of Iowa on June 14, 1866, and the patent therefor which was subsequently granted by the state to the Des Moines Valley Railroad Company. It is clear, we think, that the government has no interest in the land to be either conserved or protected, and plaintiff to the end that his title under the homestead laws may be established at the expense of the title which is asserted by West. The bill does not attempt to conceal the fact that the United State has no pecuniary interest in the controversy, and that its real purpose is to champion the cause of Fairchild, rather than to assert a title of its own. * * *

It results from these views, that, if the present action can be said to have been properly instituted in the name of the United States, as to which question we express no opinion, the action must in any event, be regarded as one which is brought for the sole benefit of Fairchild, and not for the purpose of redressing any wrong which has been done to the United States, or of recovering any property in which it now retains an interest.

Such being the attitude of the United States with respect to the litigation, the case falls within the rule, which has frequently been applied, that where the government lends its name as a plaintiff in a suit, not to enforce any public right, or to protect any public interest, title or property, but merely to enable one private person to maintain a suit against another in its name, a court of equity will hold the nominal plaintiff, even though it is the United States, subject to the same defenses which exist and might be pleaded as against the real party in interest if he were suing in his own name."

And the same rule would undoubtedly apply if a decision had been rendered in Ard's favor in the State Corut prior to the decree in the Federal Court.

Was the decision of the Supreme Court of Kansas right upon the merits?

This in turn depends upon the question whether the withdrawal of March 19, 1863, withdrew the land from the operation of the homestead and preemption act.

The act of March 3, 1863, provides that as indemnity for deficiencies in place, selections shall be made "from the public lands of the United States." The land in controversy was selected as such indemnity. The very simple question therefore is: were these lands "public lands" at the time of such selections? They once were "public lands." If at the time of the selection they had ceased to be so, what was it that caused them to be public lands? It is claimed that the settlement made by Ard in June, 1866, for the purpose of acquiring title under the Homestead Act, caused said land to cease to be public land. But we say Ard is hoist by his own petard. The land had ceased to be public land prior to the time his supposed rights attached. The Homestead Act applies only to lands which are subject to preemption. The preemption act applies only to public lands. The provisional withdrawal of March 19, 1863, (which was years prior to the time Ard's rights are claimed to have attached) withdrew the land in question from the category of "public land." Also Ard made his settlement in 1866, (p. 19). The definite location was not made until the following year (p. 37).

The case of *Northern Lumber Company* v. *O'Brien*, 139 Fed. 614, is directly in point and conclusive upon the proposition that after the withdrawal of March 19, 1863, this land was no

longer "public land." That case arose under the land grant act for the benefit of the Lake Superior & Mississippi Railroad Company Act of May 5, 1864.

The language granting clause as well as the provision for indemnity is in all material respects identically the same as in the Act of March 3, 1863. In each case the right to indemnity did not come into existence until the line should be definitely fixed and in neither case was there any provision for or recognition of any line other than the definite line. Two days after the grant, however, the Lake Superior road filed a map of its general route with the land department at Washington, and thereupon the commissioner of the general land office made an order withdrawing lands from homestead and preemption entries within the supposed limits. Thereafter a grant was made to the Northern Pacific and the lands in question come within the place limits of the grant to the last named road. When the line of the first named road came to be definitely located, the land was found not to be within the place limits of the first named road. The second road claimed the land.

The precise question was as in the case at bar as to the effect of an order of withdrawal in advance of definite location, of lands supposed to be in place limits but which the definite location made subsequently showed to have been outside of such limits.

We quote from the case as reported in 134 Fed. 303:

"The only question in the case is whether these lands having been withdrawn by executive authority prior to the passage of the act granting the lands to the Northern Pacific Railroad Company, this took them out of the grant.

The court held that it did for the reason that after such withdrawal, they ceased to stand in the category of public lands.

It would be difficult to conceive a case more directly in point. It was because the order made did in fact reserve the land from the operation of the Homesetead Act, that it took the land out of the category of public lands and if the order made in that case withdrew those lands from the category of public lands, the precisely similar order in this case and made under precisely the same circumstances, withdrew the land in question in this case from the operation of the Homestead and Preemption act.

The case above referred to was taken to the Court of Appeals and was there affirmed. 139 Fed. 614. From this decision the company again appealed and the decision of the lower courts was affirmed by this court. 27 S. C. R. 250.

In its decision the court says:

"At the time of the grant of 1864 to the Northern Pacific Railroad Company, the lands here in dispute were as we have seen among those withdrawn by the land department from preemption, settlement and sale."

Now, if the order that was made in that case did as this court expressly held, withdraw the land covered by it from preemption and homestead, why did not the precisely similar order in this case, made under precisely the same circumstances, have the same effect?

But this is not all. The Homestead Act applies only to lands which are subject to preemption. Section 10 of the Preemption Act expressly provides "that no land included in any reservation by any proclamation of the president shall be liable for any entry under the provisions of this act."

Now at the time Ard made his settlement had this land "been reserved by proclamation of the president "within the meaning of the Preemption act?

On the 19th of March, 1863, the commissioner of the general land office transmitted to the local office a diagram showing

the probable line of the road provided for in the act of March 3, 1863, accompanied by a letter in which the register and receiver were expressly directed "to withdraw from ordinary private sale or location and from homestead and preemption all the public lands in your district and lying within the ten mile limits as designated in said diagram." Also the lands in question were within the limits of the line of road as marked on said diagram. Record, pp. 35, 36, 37.

The next question is: Was such reservation of this land from private sale, homestead and preemption, a withdrawal by the president? By express statute as well as decisions, the action of the commissioner in all matters relating to public lands is deemed to be the action of the President, R. S. 453, *Patterson* v. *Tatum*, 3 Sawyer, 164.

"A withdrawal by the secretary is a withdrawal by proclamation of the president," so as to reserve lands from the operation of the homestead law. *Wolsey* v. *Chapman*, 101 U. S. 770. The relations between the secretary of the interior and the commissioner are such that when the commissioner withdraws land from preemption it will be presumed it was withdrawn by the secretary of the interior. *Weaver* v. *Fairchild*, 50 Cal. 360. Withdrawals are never in fact made by proclamation of the president. That withdrawals by the land department are in contemplation of law made by the president. *Wood* v. *Beach*, 15 S. C. R., 414, 15 S. C. R., 1028, also *Vicksburg* v. *Elmore*, 8 So., 727, where the withdrawal was precisely as here.

Therefore these lands were withdrawn when Ard's rights are claimed to have been attached. But no equitable rights can be gained by settlement after withdrawal, *Wood* v. *Beach*, 15 S. C. R. 410. But it is claimed that this withdrawal of March 19, 1863, prior to actual location of definite lines was a nullity

especially when the subsequent actual location disclosed the fact that it was not within the ten mile limit.

But those were the precise facts in the Northern Lumber Company case above cited.

With respect to this withdrawal it may be noticed, First: That at the time Ard's rights are claimed to have attached, this land had *in fact* been reserved by proclamation of the president and it was within the letter of the law withdrawing the land from the operation of Homestead act.

Second: That there was no statute which forbade withdrawals such as the one in question.

Third: For years prior it was and it ever since has been the custom of the land department to make withdrawals such as were made in this instance.

In the absence of any express authority in the act of September 20, 1850, the secretary in that year which was sixteen years before Ard made his settlement and thirty-four years before Brandon purchased withdrew indemnity lands in advance of a selection by the state.

Land Decisions, Vol. 6 L. 665.

As stated in *St. Paul* v. *Winona Ry. Co.*, 112 U. S. 721 "In some cases the statute requires the land department to withdraw lands within the secondary limits from market and in others the officers do so voluntarily." That express statutory authority is not necessary to a valid withdrawal by the executive department see *Grisar* v. *McDowell*, 6 Wall., 381: "The power of the executive department to withdraw lands for the benefit of the grant within the granted limits is too well settled to be questioned."

8 Attorney Generals Opinions, 244;
Wolcott v. *DesMoines*, 5 Wall. 681;
Wolsey v. *Chapman*, 101 U. S. 755.

A much stronger case in this direction is that of *Ballard* v. *Des Moines R. R. Co.*, 7 S. C. R. 1151. In that case the secretary had withdrawn lands which were not covered by the grant. After the Supreme Court had beclared that the grant did not cover the land, a settler took up his residence and made filing. The court held that the land was still under cover and that no right was thereby initiated.

Also in *Butz* v. *Northern Pacific*, 7 S. C. R. 106, it is held that neither settlement nor improvement nor filing nor all combined will initiate any right on lands once withdrawn and not restored.

Spencer v. *McDougall*, 15 S. C. R., 1026, is strongly in point. In that case the land department without statutory authority withdrew lands in anticipation of a grant and it was held that such withdrawal placed it beyond the power of preemption settlers to acquire rights even as against a railroad company. In *Vicksburg* v. *Sledge*, 6 So. 727, the defendant entered upon land which had been withdrawn for a railroad company. It was held that such entry was unlawful and that he was a trespasser. In *Vicksburg* v. *Elsmore*, 15 So. 703, there had not even been any grant but there had been a withdrawal in anticipation of a grant. It was held that a homestead entry on such lands was not in good faith.

We therefore conclude that the question whether or not the road for which this land was withdrawn ever became entitled to the land is wholly immaterial. Also whether or not the withdrawal was rightful or not is wholly immaterial. The preemption and homestead act makes no distinction between lands rightfully wtihdrawn and lands wrongfully withdrawn. Congress had full power in the premises. It could make such disposition of pub-

lic lands as it saw fit. It could make the entire public domain subject to such entries and it could make such exceptions as it saw fit. It saw fit to make an express exception as to lands withdrawn by the executive department. It saw fit to make the exception of lands from the operation of such law depend upon the mere fact of a withdrawal by the executive department rather than upon the rightfulness of—such withdrawal with the possible exception of cases where the statute forbids withdrawal as in the Northern Pacific grant. Also it was for Congress to say what lands should pass to the railroad company and it was not within the power of the executive department to bring non-granted lands within the grant but that department did have power to withdraw lands from the operation of the preemption and homestead law.

The grant in *Spencer* v. *McDougal*, 15 S. C. R. 1026 was in the same language as that of March 3, 1863. This court sustained a withdrawal made by the secretary *even in advance of the approval of the act by the president.*

The case of *Northern Pacific* v. *Musser*, 168 U. S. 604, is also directly in point upon the proposition that indemnity lands may be withdrawn prior to selection. In that case the withdrawal was after definite location but inasmuch as these grants give no right which can attach to indemnity lands, until said lands have been selected, the fact that the withdrawal was subsequent rather than prior to withdrawal is wholly immaterial. After withdrawal a grant was made to the Northern Pacific and the land was found to be within the granted limits of the last named company. Notwithstanding the withdrawal in favor of and the selection by the first grantee, it failed to secure patent. After the grant to the Northern Pacific, the land was withdrawn

for its benefit also. The question was whether the first grantee having been unable to secure the land, the withdrawal in its favor placed the land under cover so as to bring it within the exception found in the granting clause of the Northern Pacific grant. The court held that it did.

The court then proceeds to show that such a withdrawal is a reservation within the meaning of the word "reserved" as found in the "hereby granted" clause of the Northern Pacific grant.

Precisely the same reasoning establishes the fact that such a withdrawal comes within the meaning of the word "reserved" as found in the preemption act. If the withdrawal in that case constituted a reservation which would withhold land from the granting clause of the Northern Pacific land grant, a precisely similar withdrawal in force at the time Ard made his settlement, was a reservation within the meaning of the "no land included in any reservation by any proclamation of the president" clause found in the preemption act.

Counsel claim that it was the intention of Congress to leave all land covered by the grant open to homestead settlement until the lines were definitely fixed. The fact is at the time of the passage of the act of March 3, 1863, Congress neither intended that they should nor that they should not remain so subject. Congress was no doubt aware of the fact that by prior statutes all public lands not withdrawn by proclamation of the president, were subject to preemption or homestead but it never directed its attention to the question whether it should or should not make any change in the status of such lands along the line of the road. Mere non-action is evidence of the absence of an intention to change, but is not evidence of an intention that the lands

should not be withdrawn for the benefit of the grant in advance of definite location or selection. On the other hand, omission to expressly prohibit withdrawals, coupled with the knowledge Congress undoubtedly had of the custom of the department to make such withdrawals, is strong evidence that Congress intended to leave the department at liberty to continue to exercise its discretion as formerly as to the making of such withdrawals when deemed necessary for the attainment of the purposes of the grant.

Since 1850, thirteen years prior to the act of March 3, 1863, it had been the practice to withdraw indemnity lands in advance of selection. 5 Land Decisions, 655. If there was any prohibition of withdrawals in the act of March 3, 1863, it was an implied prohibition, but an implied prohibition must be based upon some affirmative provision absolutely inconsistent with the right to perform the prohibited act. It cannot be based upon a mere negation. *Prouty* v. *Stover*, 11 Kansas, 235. A provision declaring what may be done in the event homestead entries are made is not inconsistent with a power in the department to withdraw land from homestead entry.

In the Northern Pacific cases, the decision is based upon express affirmative provisions which do not appear in the act of March 3, 1863.

The act of July 26, 1866, is claimed to be a legislative construction of the act of March 3, 1863. But the land had already been withdrawn for the benefit of the L. L. & G. or main line provided for in the grant of March 3, 1863, and the act of July 26, 1866, related only to the M. K. & T. branch. At the time of the withdrawal of April 30, 1867, made for the benefit of the M. K. & T. branch, the land was already under the

withdrawal for the benefit of the main line, made March 3, 1863.

The Northern Pacific Railroad cases.

It will be claimed there have been decisions of this court arising under the land grant to the Northern Pacific Railway Company which in effect reverse the cases relied on by appellees. Precisely the same contention was made by appellee in the case of *Northern Lumber Company* v. *O'Brien*, 27 S. C. R. 250, and with equal reason but without avail. In fact the claim could be made with far stronger reason in that case since section 3 of grant in that case did expressly withdraw lands after definite location and it might have been urged with some plausibility that an express withdrawal after, would be an implied prohibition of withdrawal prior to definite location. The decision in that case is a sufficient answer to any argument based upon the decisions under the grant to the Northern Pacific. Nevertheless we shall briefly notice those decisions.

Hewit v. *Schultz*, 21 S. C. R. 314, was a case where the railroad company designated its *general* route and thereupon the commissioner withdrew all unsurveyed odd sections within the place limits. Thereafter the line was definitely located, after which there was a second order withdrawing lands within the indemnity limits. After this last withdrawal and before any selection of indemnity Schultz made a homestead settlement on an indemnity section covered by the withdrawal. Thereafter the land was selected by the company but was patented to Schultz. The decision was in favor of Schultz upon the ground that the act itself contained a clause which expressly provided that the provisions of the homestead act should be extended to all lands in the line of the road except to lands "hereby granted" and

it was further held that indemnity lands were not within the "hereby granted" provision of the act. The secretary of the interior had for many years held that this clause extending the provisions of the homestead and preemption act was an express prohibition of a withdrawal of lands from homestead entry, which the grant itself said should be subject thereto.

This court held that ruling of the secretary "was not so palpably erroneous as to justify the Supreme Court of the United States in adopting a different construction."

The act of March 3, 1863, unlike the one in *Northern Lumber Company* v. *O'Brien, supra*, contains no such prohibitory clause, and for that reason *Hewitt* v. *Schultz* is not an authority against us. And if the withdrawal now in question was inoperative, it was upon some ground other than that which was the basis of the decision in that case.

We next consider *Nelson* v. *Northern Pacific Railway Co.*, 23 S. C. R. 302. In that case there was first a general or provisional location followed by a withdrawal of the land within the supposed in place limits, which included the land in controversy. After the definite location, there was a second withdrawal which showed the land to have in fact been within the in place limits as was supposed at the time of the first withdrawal. For this reason in considering the bearing of Nelson case as an authority in the case at bar, we ignore the fact that the definite location showed the land to be within the indemnity limits instead of within the in place limits as supposed at the time of the withdrawal was made. Unless the Nelson case would have been an authority against us, even if the land had in fact turned out to be in place, the Nelson case is not an authority against us. Therefore in considering the bearing of the Nelson case we shall as-

sume that the land did prove to be within the in place limits.

When we consider the object of these land grants there is every reason why in the absence of a prohibition in the statute there should be a withdrawal of granted lands within the in place limits. Years might elapse between the date of the grant and the time of definite location. In the interim, in the absence of a withdrawal the granted lands might be taken up by homestead and preemption to such an extent as to prevent the building of the road and in this way the purposes of a grant wholly defeated.

From an early day it has been the custom to make such withdrawals and no case can be found where any decision either of the courts or of the land department has ever denied the right to do in the absence of some prohibitory clause in the grant itself.

The Northern Pacific grant stands in a class by itself. The construction of that road was in the nature of a military necessity. The portion of our national domain west of the Rocky Mountains, speaking practically, was about as far if not farther from us than it was from rival nations. In the event of invasion in force we could not have afforded the slightest protection overland. The granting clause states as the purpose of the road "to secure the safe and speedy transportation of the mails, troops and munitions of war and public stores."

As shown in the opinion in the Northern Pacific cases, in many important respects the conditions were radically different from those which existed in case of other land grants. Because of these facts the act itself varies in several respects from most if not from all other grants. More especially it varies from the act of March 3, 1863. These differences may be noted. In

the act of 1863 the granting clause purports to convey all odd sections within the ten mile limits. Then follows the indemnity clause which provides that "if it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any section, or any part thereof granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same or that the same has been reserved by the United States for any purpose whatever then the secretary should cause to be selected for the purposes aforesaid from public lands of the United States nearest to tiers of sections above specified."

But in the Northern Pacific act the designation of the lands in lieu of which indemnity is to be selected, appears in the granting clause itself. It is only such lands within the in place limits as at the time of definite location as are "free from preemption or other *claim* or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office" *that purport to be granted.* Then follows the clause which provides "wherever prior to said time" (that is the time of definite location) "any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead* settlers or preempted or otherwise disposed of, other lands shall be selected," etc. From which it will appear that it is not merely lands to which homestead rights have attached which are excepted from the granting clause or for which indemnity is allowed. Unless lands within the granted limits are free from *claims* at the time of definite location, the grant does not apply, and if they are merely *occupied* by homestead settlers, that is sufficient to prevent the land from going to the railroad company. Therefore we find that precisely the same

principle determined the decision in the Nelson case as in the case of *Hewitt* v. *Schultz*. The homestead act did not apply to Schultz but the grant to the Northern Pacific excluded from the grant lands which at the date of the definite location were not "free from claim" and all lands which were *occupied* by homestead settlers and the land in question in the Nelson case was not "free from claim" and it *was* occupied by a homestead settler, therefore it was not within the "hereby granted" clause. It came directly within Section 6 of the grant which expressly provides that "the provisions of the act of September, 1841, granting preemption rights to acutal settlers upon public lands shall be and the same *hereby are extended to all other lands on the line of said road when surveyed excepting those "heretofore granted."* The prohibition of withdrawal in the Northern Pacific cases is based upon an express affirmative provision. In this case such inhibition arises if at all from a sheer negation. The absence of an affirmative provision may show the absence of a particular intent, but it certainly does not show the presence of the contrary intent. In passing the act Congress recognized the fact that homestead entries might continue, but the act contains nothing to show that it ever progressed so far as to even consider the propriety of preventing withdrawals.

It thus clearly appears that the decisions in these Northern Pacific cases which hold the particular withdrawal in question in those cases to be inoperative, were based upon an approval of rulings theretofore made by the secretary of the interior that the Northern Pacific grant contained provisions which "forbade the land department to withdraw from the operation of the homestead and preemption laws and lands within the indemnity limits of the grant made by act of July 2, 1864." See *Hewitt* v. *Schultz* 21 S. C. R. 313.

The Nelson case has been referred to twice since it was rendered, but in cases where the question of the effect of a withdrawal was involved. The case in 15 S. C. R., 1026, is the only case where the Supreme Court passed upon the effect of a withdrawal under statutes similar to the acts of 1863 and 1866. Until 1888, which was after Brandon has made all his payments except the last, no question was ever raised as to the fact that an executive withdrawal placed lands beyond homestead and preemption, even under the Northern Pacific grant. In that year, as shown in *Hewett* v. *Schultz*, 21 S. C. R., 313, Secretary Vilas held otherwise as to the Northern Pacific because of special provisions in that particular grant. The decisions in *Hewett* v. *Schultz* and *Nelson* v. *Northern Pacific* did not go farther than did Secretary Vilas. There was no thought of overruling the many decisions cited in Judge Brewer's dissenting opinion, rendered under acts differently worded from the Northern Pacific. And we know with absolute certainty that the Land Department itself still looked upon the authorities cited in Justice Brewer's dissent as applicable to the grants now under consideration.

In June, 1889, one year after laying down the rule as to withdrawal under the Northern Pacific grant which was followed by the U. S. S. C. in *Hewett* v. *Schultz* and *Nelson* v. *Northern Pacific*, there came up the case of *Caldwell* v. *M., K. & T.*, reported in 8th Land Decision, 570. In 1865 one Kelly made homestead entry on the Northeast ¼ of Section 29, Township 23, Range 18, the same being Allen County lands and like those in controversy supposed to be within the granted limits of the act of 1863 and also covered by the withdrawal of 1863. Says the secretary in his decision:

"It would seem from this record that the land was at that date (referring to withdrawal of 1863), vacant. The order of withdrawal found the land in that condition and reserved it from sale and preemption and homestead entry. The order was never revoked. It follows that no right could be acquired under an entry made subsequent to the date when the order became effective."

8 L. D., 570.

Also John Ard made application for homestead entry on the Northwest ¼ of this same section. This application was made subsequent to the withdrawal of March, 1867. The fact of the withdrawal of 1863 was not called to the attention of the department. We quote from the decision of the Land Department:

"The question is whether any right was acquired against the railroad by settlement upon the tract after its withdrawal. The withdrawal in this case was an executive withdrawal, not directed by the granting act. In this respect it was similar to that in the case of Minnesota and Omaha Railway, wherein the granting act of June 3, 1856, and of May 5, 1894, contain no provision for withdrawal but an executive withdrawal was nevertheless made. In that case of *Shire* v. *Company,* it was held that no rights legal or equitable as against a railroad company are acquired upon lands withdrawn by executive order for the benefit of the grant. In department instructions, dated March 11, 1891, this doctrine was reaffirmed."

The application was refused, 14 L. D., 369.

This was in 1893. Also March 11, 1891, three years after the adoption of the Land Department of the rule laid down in the Nelson case as to the non effect of withdrawals under grants worded like the Northern Pacific, the Land Department, 12 L. D., 254, says: "This case of *Riley* v. *Wells* (cited in *Woolsey* v. *Chapman,* 101 W. S., 770. and reported in 19 U. S. L. Ed.,

648), has never been overruled or modified, but has been referred to and approved in a number of decisions of the Supreme Court, and must therefore be accepted as expressing the opinion of that court as to the absolute invalidity of settlements upon lands withdrawn by executive order."

We cite these decisions not so much because of what is decided, but because of the date of the decisions. They show that notwithstanding the secretary's decision in 1888 that because of implied prohibitions in the Northern Pacific grant withdrawals cannot be made under that grant, the general rule applies as to other grants which have no similar provisions even though the grant makes no provision for withdrawal. The decisions in *Hewett* v. *Schultz* and *Nelson* v. *Northern Pacific* were avowedly based upon the fact that the uniform construction of the Northern Pacific grant persisted in by the Land Department for years was not clearly wrong. We invoke the very same principle. During the very same years that the Land Department was so construing the grant to the Northern Pacific that same Land Department was still following the construction of the grant now under consideration for which we contend.

The following distinctions between the Nelson case and the one *sub judice* are to be observed:

1. The Nelson case presents an instance where the Land Department undertook to effect a withdrawal of land in aid of the grant, which the terms of the grant (as expressed in the granting section), *declared should be and remain open to homestead settlement.*

The withdrawal could not have taken effect without repealing the last clause of the granting section of the Northern Pac. R. C. charter, which *expressly kept out of the grant lands falling within specified classes.*

The court lay great stress on the inducement held out to immigrants to those uninhabited regions, who risked their lives and fortunes in reliance on the rights secured to them by the general land laws and saved to them by the granting clause of the N. P. charter.

Now, in the Act of March 3, 1863, the language of the granting clause is simply "every section of land designated by odd numbers;" it does not say public lands which are free at time of definite location from any sale, preemption, etc.

There is nothing in the granting section of the Act of March 3, 1863, *expressly saving to the public the right to preempt or occupy for homestead, etc.;* consequently there is nothing expressly or impliedly taking away from the department the right to do what it had, from the beginning been recognized as having the right to do, viz: withdraw this land from preemption settlement and sale in aid of the road provided for in said Act.

Moreover, there was no vast uninhabited region to be occupied by this road between Leavenworth and the south line of the state, that justifies the court in saying that it would be bad faith to give the withdrawal in this case effect, nor does it appear that the lands involved were unsurveyed, so that homestead settlers, or others, could not determine whether they were settling on odd or even numbered sections.

The 1863 grant does not require a withdrawal prior to definite location, but recognizes the right of the department to deal with the lands as it saw fit. It left the citizen, contemplating settlement on these lands, to his rights under the land laws as affected by the recognized practice of the department to withdraw lands in its discretion.

2. The Nelson case presents an instance where the department undertook to *enlarge the grant* to the Nor. Pac. R. Co. by keeping out of market by its withdrawal order, lands, which, by the term of the grant, were to be kept open for settlement until definite location.

Nothing less than legislative power could do this, and it cannot be otherwise, than, that a withdrawal order cannot be recognized if it seeks to withdraw lands which the legislature has declared shall remain open to settlement or other disposition under the general land laws.

Now the 1863 grant contains no language expressly or impliedly intimating that the right of the citizen to acquire land under the existing laws, or the right of the department to withdraw lands and thus suspend the right of the citizen, is to be affected until definite location.

On the contrary Sec. 3 recognizes that odd sections or parts of sections might remain subject to disposal under the general laws, for it provides for indemnity lands in lieu of lands thus lost.

This shows that the control of the department over the public lands whether by withdrawal order or otherwise was left unimpaired.

This means that the department could withdraw lands in aid of the 1863 frant, as had been done in aid of other grants.

3. The withdrawal in aid of the 1863 grant does not run counter to an express reservation in favor of settlers, or others found in that grant, as the withdrawal in the Nelson case did.

4. The decision in the Nelson case in *sue generis,* inasmuch as it rests upon the view of a majority of the court took

of the limitations imposed on the grant by the last clause of the granting section.

The court did not undertake to lay down a rule that would apply to other railway grants, for they say:

"The words 'occupied by homestead settlers' show that Congress intended by the charter to the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim,* which existing at the date of definite location, would exclude from the grant, land that might otherwise be covered by it."

The dissenting opinion considers this opinion of the court as subversive of the principle adapted in

Buttz v. *Pac. R. Co.,* 119 U. S., 55;
Hewett v. *Schultz,* 180 U. S., 139;
Menotti v. *Dillon,* 167 U. S., 703;
Nor. Pac. R. Co. v. *Musser-Sauntry, Etc.,* 168 U. S., 604;
U. S. v. *Oregon & C. R. Co.,* 176 U. S., 28.

These cases recognize the right of the department to withdraw lands from market in aid of a railway grant in anticipation of definite location of the road.

This Nelson case simply adds to this rule the qualification that where the terms of the grant to the railway (as in the Northern Pacific), expressly provides that the rights of homestead settlers shall not be taken away until definite location, the power of the department to withdraw lands as against homestead settlers is taken away.

That this view of the Nelson case is correct appears from the reference thereto found in the opinion of the court, in the

case of *Toltec Ranch Company* v. *Cook*, 191 U. S. Op., 541, as follows:

"*Nelson* v. *Northern Pacific Railroad Company* was an action brought by the Railway Company to recover possession of a quarter section of land claimed to be within the land grant of the Northern Pacific Railroad, and the company held the patent. Nelson claimed to have settled upon the land three years before the definite location of the road. He claimed, therefore, to be within the exceptions of the grant. The land when he settled on it was unsurveyed, and the effect of this constituted one of the questions in the case. Upon the filing of a map by the railroad company of its general route, an order was made by the Land Department withdrawing from settlement the land within the limits of the grant. The effect of this order was another question in the case. It was held, 'that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such a map,' and it was further held that Nelson's settlement upon the occupancy of the land was valid, and constituted a claim upon the land within the meaning of the Northern Pacific Act of 1864. In other words, it was held that the land was excluded from the grant by express words. The operative words which produced the effect was expressed in the following provision of Section 3 of the Act: 'And, wherever, prior to said time (of definite location), *any* of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, *other lands* shall *be selected* by said *company in lieu* thereof," etc., etc.

It is therefore a sufficient answer to any argument based upon the Northern Pacific cases, to say that the act of March 3, 1863, does not contain any of the provisions which constitute the exclusive basis of the decisions rendered in these cases. Withdrawals under other grants remain precisely as if these decisions had never been rendered and the dissenting opinion by Judge Brewer in the Northern Pacific cases applies with full force to the case at bar.

BRANDON'S VESTED RIGHTS ACQUIRED UNDER A RULE OF PROPERTY.

The usages of the land department and the decisions of this court in reliance upon which Brandon made his purchase constitute a rule of property established under federal authority and it is the duty of the federal authority to uphold the title based upon such rules

There is nothing in these Northern Pacific decisions to indicate that the court regarded such decisions as a reversal of any rule theretofore followed with respect to withdrawals in advance of definite location as to lands in place or selection in case of indemnity lands. But even if it were so regarded, it could not affect Brandon's rights. Brandon's rights attached in 1884. He completed his payments in December, 1888. The rule even as to the Northern Pacific grant was never adopted by the land department until 1888. *Hewitt* v. *Schultz,* 21 S. C. R., 313. Ard's supposed equities originated in open and conscious defiance of, while Brandon's rights were acquired in accordance with long established construction of the law governing the case.

That the Nelson case was never considered either by the land department or by this court as applying to withdrawals made under grants similar to that of March, 19, 1863, clearly appears.

Ard's supposed rights were acquired in defiance of the rulings and decisions of the department of this court. Brandon, on the other hand, paid out his money in reliance upon them. Can it be claimed Ard has any equities which are superior to Brandon's claims? If so, these rulings of the executive department and the decisions of this court have indeed proved to

be a snare and a delusion for Brandon who parted with his money in reliance upon them.

As showing the established usage of the land department prior to the time Brandon purchased with respect to withdrawals when not actually forbidden, see 5 Land Decisions, 655, referring to 24 How., 394, which shows that as early as 1850 the land department in the absence of any express authority was accustomed to withdraw indemnity lands, and that, too, in advance of selection. This was sixteen years before Ard made his settlement on indemnity lands which had been withdrawn.

"That the power resides in the executive department from an early period in the history of the country, to make reservations has never been either legislatively or judicially questioned but has on the contrary been recognized. It constitutes a part of the land office law, exists *ex necessitate rei* as indispensable *to the public weal* and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed."

Land Decisions, Vol. 1, p. 703, 1881.

In *Wolsey* v. *Chapman*, 101 U. S., 768, it was held citing *Riley* v. *Wells*, that the withdrawal of "lands from private entry was sufficient to defeat a settlement for the purpose of preemption, while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal."

Land Decisions, Vol. 2, p. 553, 1883.

"I need not cite authority to show that such an executive withdrawal of the land within the probable limits of the road was entirely valid and had the effect to reserve from entry and sale all public lands within the limits of the withdrawal, and I hardly need to say that a valid withdrawal cannot be gotten rid of by 'overlooking or ignoring' it."

Land Decisions, Vol. 2, p. 568, 1883.

In this case "before the line of the road was definitely fixed, in anticipation of the probable limits of the grant a withdrawal of the land was ordered." (p. 562.) It will therefore be observed the case was precisely like the one now under consideration.

"The power of the executive department of the government, however, to withdraw land for the benefit of the granted limits without any direction expressed in the act is now too well settled to be questioned. * * * Such power had been recognized by Congress (10 Stat., 269) and had been exercised by the land department for a long time before the Northern Pacific act was passed. * * * By point of reasoning the authority to withdraw lands within the indemnity limits would follow."

Land Decisions, Vol. 2, p. 514, 1883.

"The authority of the department to withdraw lands in the indemnity limits for the purpose of allowing the grantee to make selections in the absence of express provision made therefore in the grant has never been directly decided by the courts but in several cases such authority seems to have been recognized by the Supreme Court and such has been the ruling of the department."

Land Decisions, Vol. 5, p. 651. (May 23, 1887).

"When a principle has been settled by judicial decision for many years and has become a rule of property, and titles have been vested on the strength of it, only the most palpable error would justify a court in overruling previous decisions."

13 Century Digest, c. c., 2163, Sec. 336.

The fact that the suit as brought in 1886 was limited to odd section indemnity was of itself notice to Brandon that the government recognized the withdrawal of 1863 as valid and he paid three-fourths of the purchase money thereafter.

We invoke in behalf of Mrs. Brandon the same principle

which determined the decision in favor of Schultz in 21 S. C. R., 309. This court there says the decisions of the secretary as to the invalidity of the withdrawal under the Northern Pacific grant, were not so palpably erroneous as to justify the court in arriving at a different conclusion. And we say now the decisions of the land department, and concurred in for a generation, upholding withdrawals under grants precisely like that of March 19, 1863, are not so palpably erroneous as to justify this court in arriving at a different conclusion to the detriment of one who paid his money in reliance upon the prior rulings.

These rulings and decisions became a rule of property established by federal authority and the federal authority should uphold a title based upon them.

THE OPINION OF THE KANSAS SUPREME COURT.

We have already shown that the court was in error in stating that the M. K. & T. suit was not instituted through the procurement of the Settlers' Protective Association of which Ard was an active member. Also that it was in error in saying that the effect of the order of withdrawal was not tendered by the bill nor litigated nor determined by the judgment. The opinion says that the diagram and order of March 19, 1863, did not have the effect to segregate all lands included in the diagram from the public domain and set it apart for the exclusive use of the railroad, is not well founded. The order speaks for itself. It at least did have the effect to render the land not open to homestead while it continued in force: "You are hereby directed to withhold from ordinary private sale or location and also from preemption or homestead," is the language used. (p.

35). It also says such was not the understanding of the land department as is conclusively shown by the withdrawal order of April 20, 1866, which says:

"Also where settlement may have been made on odd numbered sections outside of the ten and within the twenty mile limit prior to the receipt by you of this order of withdrawal, the settler will be protected in his rights by reason of such prior settlement."

But this does not show that the commissioner understood the withdrawal of March 19, 1863, was unlawful. The most that could be claimed would be that the commissioner wished to ignore such prior order which as well said by Secretary Teller, (2 Land Decisions, 568) cannot be done: "If those withdrawal orders were valid no rights legal or equitable were acquired by his occupation and settlement."

Wood v. *Beach*, 15 S. C. R., 411.

Again, Ard had no "rights" by reason of his prior settlement. It was only such settlements as were made prior both to the receipt of the withdrawal of 1867 and that of 1863 that could have conferred any rights upon the settlers.

The opinion next proceeds to state all of the public domain which prior to definite location of any line of road on to which the right of homestead had attached "were excluded from the granting clause of the act." Now, the fact is nothing whatever is reserved from the granting clause of the act. All lands within the ten mile limit are within the granting clause. Subsequent to the granting clause, however, there is a provision for indemnity in lieu of granted land to which at the time of definite location the right of homestead had attached.

The court then proceeds to say: "Ard's rights attached

prior to definite location. He is therefore within the exact provision of one of the reservations in the grant." A more perfect example of assuming a fact as conclusive proof of its existence could not be imagined. The court overlooked the fact that the precise point we make is that Ard's alleged rights *never attached at all.* The court then proceeds to cite the Northern Pacific case as directly in point. The trouble is that in the Northern Pacific case the mere fact of the settlers' occupancy at the time of definite location there was a claim left the land wholly unmentioned even in the granting clause. In our case, however, Ard must not only have had a claim, he must not merely have been an occupant but his rights must *have attached.* And even these facts would not have left the land outside of granting clause as in the Northern Pacific case though it would have shifted the railroad's title off on to lien lands.

The court next quotes language from *Sjole* v. *Dreschel,* 26 S. C. R., 155, which exactly sustains its conclusion but it omits the opening clause of the sentence quoted, which we supply: "From the numerous cases in this court *relating to the above Act of July 2,* 1864 (italics ours), the following propositions are to be deduced:" The court then proceeds to comment upon *Northern Lumber Co.* v. *O'Brien,* 139 Fed., 614, affirmed in 204 U. S., 190, and quotes the clause "until the definite location of the road these sections remain within the disposing power of Congress even though they be withdrawn for the protection of the grant as in the present case," as having some bearing against our contention. Not at all. We do not claim that the withdrawal of March 3, 1863, caused the rights of the railroad company to attach thereto as of that date. All we claim

is that such withdrawal withdrew the land from the category of public land and put it in the class of lands not subject to homestead.

THE PATENT OF ARD.

This patent is an utter nullity. One patent having been given the land office was without jurisdiction in the premises until after the prior patent had been set aside. The prior patent has not been set aside, and not only so but in two successive suits brought by the government for the purpose of setting it aside, the government has been defeated and one of these suits was by express statutory authority. The holder of the patent has a final judgment against the government establishing the fact that the government is not entitled to set this patent aside either on its own account or because of Ard's prior equities. That the patent to Ard is an utter nullity, see *Peyton* v. *Dismal*, 129 Fed.

Moore v. *Robbins*, 96 U. S., 534. But for the fullest discussion of the subject see decision of Justice (then Secretary Lamar), 5 Land Decisions, 488.

Ard v. *Brandon*, 15 S. C. R., 408.

Upon the former appeal the record did not contain the slightest intimation of the specific, most material fact that the land in question was covered by the diagram mentioned in the withdrawal letter of March 19, 1863. The case was remanded for further proceedings which were had and that fact now appears, page 37. Upon the former appeal the decision was based upon the fact that "the land was not within the in place limits *and had not been withdrawn from entry and settlement.*" It now appears that it *had* been withdrawn from entry and settlement.

CONCLUSION.

But the sheet anchor of our contention is this: *Ard's* equities are insufficient unless they are such as entitle him to legal title. He can only acquire legal title by obtaining a patent from the government and the patent he now has is a nullity. When he applies to the government for a patent, Brandon will have a right to be heard and Brandon may rightly say to the government:

"You have no right to give Ard a patent based on his equities against me, for in a suit in which you compelled me to litigate that precise question with you, I have secured a final judgment against you, establishing the fact that he has no equities as against the patent you have already given me. Ard is enitled to a patent or he is entitled to nothing, and you cannot give him a patent unless you have a right to set aside the patent you have given me, and the judgment against you which I now present forever debars you from doing that."

Unless this contention be sound, the action of the government in prosecuting that suit was a most unjust and oppressive exercise of the power of the sovereign against a private citizen, and on behalf of other citizens in like situation, we ask that the numerous decisions of this court declaring it to be the duty of the government to prosecute suits against holders of patents, in the interest of settlers claiming prior equities, be expressly overruled.

All of which is respectfully submitted.

J. A. Pollock

L. W. KEPLINGER,

Attorney for Brandon.

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Office Supreme Court, U. S.
FILED.
MAR 3 1908
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 24.

LUCINDA BRANDON, PERSONALLY, AND AS THE ADMINISTRATRIX OF THE ESTATE OF ALEXANDER BRANDON, PLAINTIFF IN ERROR.

VS.

NEWTON L. ARD, DEFENDANT IN ERROR.

Brief and Argument on Behalf of the Defendant in Error.

OSCAR FOUST,
EWING, GARD & GARD,

IN THE

SUPREME COURT OF THE UNITED STATES.

NUMBER 20579.

LUCINDA BRANDON, PERSONALLY, AND AS THE ADMINISTRATRIX OF THE ESTATE OF ALEXANDER BRANDON, PLAINTIFF IN ERROR.

VS.

NEWTON L. ARD, DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is an action in ejectment, wherein the plaintiffs in error, (plaintiffs below also) claim the right to possess an eighty acre tract of land in Allen County, Kansas, which is in the possession of the defendant.

The petition filed in the trial court described the land as the northeast quarter of section eleven, township twenty-six, range twenty, but in fact only the north half of the northeast quarter of section eleven is now in controversy, as Ard gained the eighty acre tract in section two which adjoins this tract, in litigation with C. H. Pratt, who had bought it from the M. K. & T. Ry. Co. (See *Ard* v. *Pratt*, 156 U. S., 537, decided March 4th, 1895.) There being no dispute as to the south half of the quarter claimed in the petition in this case.

The eighty acres here in dispute is claimed by Ard under an attempted homestead entry and actual occupation and improvement of this eighty acres in section eleven, (See printed record 37 *et. seq.*); Pratt having accepted the decision above referred to as final, as to the tract in section two.

Ard went upon the land and commenced work about the last of June, 1866. He actually settled upon it the 14th of July, 1866. He went to the local land office at Humboldt, Kansas, made out a homestead application for said land and tendered the application, together with the proper fees, to the Register of the Land Office (Printed record, page 37). The application and fees were rejected by the officers on the ground, as they stated to him at the time, that the land was immediately within the granted or place limits of the L. L. & G. R. R. Company's grant of public lands, and that the same was not therefore subject to homestead entry. (Printed record, pages 37 and 38.)

His testimony further shows as follows: (Commencing near top of page 38 of printed record):

> "Said Register advised me if I wanted said 160 acres, that I could first make a pre-emption filing on 80 acres of land, and put a house on said land wthin 12 months, and prove up and pay for it at $2.50 per acre, and then I could homestead 80 acres more and by that plan I could get the 160 acres; but said Register told me that I could change a pre-emption filing at any time, if I wanted to, into a homestead. I told said Register as he would not allow me my homestead I would make a pre-emption filing on part of the land, as he would not let me claim or file only one 80 acres. So he made out the filing and I paid him a fee of $2.00 which he said was the fee; a copy of said receipt is in words and figures following:
>
> 'Register Office, Humboldt, Kansas, July 14th, 1866. No. 2115. I certify that Newton L. Ard, has this day filed

in this office his notice to claim by right of pre-emtpion the west one-half of the southeast one-fourth of section No. 2, in township 26 S., in range No. 20 east of the 6th principal meridian in the State of Kansas, $2.50 per acre within the R. R. limits. Watson Stewart, Register.'

The words and figures '$2.50 per acre within R. R. limits' being written in red ink transversely across the face of the certificate.

"In the fall of 1866 I broke said land, and in the winter and spring of 1866 and 1867 I hauled rails and fenced about 4 acres and about the first of March, 1867, I built a house on said land, and in the spring of 1867, I put about 4 acres in corn and broke out about 20 acres of prairie, and in the fall put in wheat and in the winter of 1867 and spring of '68 I hauled rails and poles and fenced 80 acres of said land as described; and in the spring of 1868 I put in corn about 4 acres, and broke out with what I had already broken about 75 acres. In the spring of 1867 I heard that all land in Allen County was withdrawn for R. R. purposes; I went to the United States Land Office at Humboldt, about the 1st inst. of June, 1867, for the purpose of changing my pre-emption filing into a homestead. Of the Register, then N. S. Goss, I asked if I could change said filing as described into a homestead. Said Register told me I could not as he said all said land was withdrawn for R. R. and when I withdrew my pre-emption filing the land would revert to the R. R. Then I asked the Register if I could pay for the land under the pre-emption law, and he told me I could, provided I had a house on said land within six months from the time I made said filing and was living on said land. I told said Register, it was about 8 months before I had a house on said land. And I was told by the Register, Watson Stewart, that if I got a house on said land within 12 months it would do. The Register told me I could not prove up and pay for the land as I did not have a house upon said land within 6 months from the time the filing was made; as said Register said that it was the rules of said office, but he advised me to stay on the land as he thought it

would fall outside of the limits of the R. R. and that the R. R. would get land enough without going so far out I went back home and continued to occupy said land, and in the spring of 1871 I built another house on said land 12x14, one story high, made out of native lumber covered with shingles, 2 floors and 2 windows. Sometime in February, 1872, I went to the United States Land Office and made a further effort to homestead said land as described, but said Register refused to receive any fees or grant any homestead papers, giving the reason that the land was withdrawn for R. R. purposes. Said Register advised me to stay on said land as he said from where the R. R. was built I was outside of the granted limits, and he thought the company would get land enough without going so far out from said R. R. roads. So I have kept constantly improving said land and have farmed said land continuously each and every year since 1866, and also have occupied the same since that time, and have 80 acres in cultivation; 120 acres fenced with hedge and wire, a bearing orchard of peach, cherry and apple trees; two wells, corn crib and stable and other buildings; improvements worth $1,500.00.

At the time the R. R. company, through whom the plaintiff claimed title, appraised this land, said appraisers knew and were informed by me that I was homesteading said land, and I had erected valuable improvements thereon; that the R. R. company's appraisers of the land knew at that time that I had 80 acres under fence and 70 acres in cultivation and ever since the 14th day of July I have been in actual, open, visible and exclusive possession of the land in controversy. At the time I made settlement on said land I was duly competent and qualified to make a valid homestead entry. And I still reside on said land with my family; that I did have all the required qualifications and improvements to enable me to perfect a homestead or pre-emption; that when I settled on said lands, I did so in good faith and for the sole purpose of making it my homestead.

"(It is admitted that under the Act of Congress of

July 26th, 1866, the M. K. & T. R. R. Co., did not file a map of definite location until December 6th, 1866.)

"That since the decision of this case on appeal to the Supreme Court of the United States, I renewed my application to homestead the land in controversy, under and on the strength of the judgment rendered by the Supreme Court of the United States in this action, together with the said west one-half of the southeast one-fourth of section 2, on or about the 27th day of November, 1896.

"The said application was favorably received by the land office then located at Topeka, Kansas, and afterward on making proper proof and paying the required fees, I received a patent therefor, dated December 17th, 1900."

The plaintiffs in error claim the land by virtue of a deed from the M. K. & T. Ry. Company, dated December 17th, 1888, (printed record page 6). Brandon had a contract for the purchase of the land from the railway company dated about four years prior to the execution of the deed (printed record, page 6).

The Brandon chain of title therefor is made up by:

First: The conditional grant of lands for benefit of railroads, March 3d, 1863.

Second: M. K. & T. Ry. Co.'s succession to rights of roads mentioned in the grant of 1863.

Third: The patent from the State of Kansas to M. K. & T. Ry. Co. dated May 19th, 1873 (printed record, page 40).

Fourth: The deed from the Ry. Co. to Brandon, Dec. 17, 1888 (printed record, page 6).

The title of Ard is as follows:

First: The settlement on the land in June and July, 1866 (printed record, page 37).

Second: The application at the proper land office and tendering of proper fees to make a homestead entry of the land (printed record, page 37).

Third: The possession by him of the proper qualifications to make a valid homestead entry, as well as the performance by him of conditions precedent thereto. (crinted record, pages 37, 38 and 39.)

Fourth: The unauthorized rejection by the Register and Receiver of the land office of his application and fees. (Printed record, pages 37, 38 and 39.)

Fifth: His performance of all conditions subsequent to the entry and precedent to the right to a patent. (Printed record, pages 37, 38 and 39.)

Sixth: His actual residence upon and occupation of the land as a settler and under claim of title in good faith ever since June, 1866; said possession being open, notorious, and hostile to all other claims. (Printed record, pages 37, 38 and 39.)

Seventh: The recognition of the justness of his claim to title by the land department in December, 1896, and the permission by it given him to perfect his homestead entry. (Printed record, page 41.)

Eighth: The issuance to him by the United States of a patent to the land in 1900, in full recognition of his rights under the homestead laws. (Printed record, page 49.)

Thus, Ard commenced to acquire a right to the land in 1866, and the railroad company laid claim to it in 1872 when it made the selection of indemnity lands.

When the line of the M. K. & T. Ry. was definitely located, the land was found to lie about two miles outside of the

place or ten mile limit and fell in the category of indemnity lands instead of place lands. (Printed record, page 6.)

On the third day of March, 1863, Congress passed a special act, entitled as follows (12 St., 772, Chapter XCVIII):

> "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State."

So much of said act as is applicable here, is as follows:

> "Section 1. That there be, and is hereby, granted to the State of Kansas for the purpose of aiding in the construction of a railroad and telegraph from the City of Leavenworth by way of the town of Lawrence, and via the Ohio city crossing of the Osage River, to the southern line of the state, in the direction of Galveston Bay, in Texas, etc., etc. Every alternate section of land, designated by odd numbers for ten sections in width on each side of said railroads, and each of its branches.
>
> "But in case it shall appear that the United States have, when the limits or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that, the right of pre-emption or homestead settlement has attached to the same or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purposes, aforesaid. Provided, that the land to be so selected shall, in no case, be located further than twenty

miles from the lines of said road and branches; Provided, further, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided. * * *"

On March 19th, 1863, the commissioner of the General Land Office sent to the local land office at Humboldt the letter which appears on pages 35, 36 and 37 of the printed record of this case, and which is as follows:

"General Land Office, March 19, 1863.

Register and Receiver, Humboldt, Kansas.

Gentlemen: The act of congress approved March 3, 1863, makes a grant of alternate sections of land to Kansas, to aid in the construction, 'first, of a railroad and telegraph from the City of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the state,' 'with a branch from Lawrence, by the valley of the Wakarusa River, to the point on the Atchison, Topeka & Santa Fe railroad where said road intersects with the Neosho River; second, from Atchison, via Topeka, to the western line of the state, in the direction of Fort Union,' etc., 'with a branch from where this last named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley.'

"This law concedes 'every alternate section of land, designated by odd numbers, for ten sections in width, on each side of said roads and each of its branches.'

"The first section further provides that, where lands thus granted have been sold, reserved, or otherwise appropriated, or the rights of pre-emption or homestead settlements have attached, other lands, designated by odd numbers, in no case to be located further than twenty miles from the lines of said roads and branches, shall be selected by direction of the Secretary of the Interior, etc.

"The second section requires the reserve (even) section within the ten-mile limits to be sold at not less than double the minimum price of the public lands. No such section can, however, be sold at private entry until after it shall have been first offered at or about the increased minimum price: 'Provided, that actual and *bona fide* settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation and occupation as now provided by law, purchase the same at the increased minimum price aforesaid; and provided, also, that settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.'

"The senators and representatives in Congress from Kansas have requested the withdrawal of the lands along the lines or routes of the railroads and branches provided for in this act. I inclose a diagram showing the probable lines of said roads and branches, with the ten-mile limits on each side, (colored green) and you are hereby directed to withhold from ordinary private sale or location, and also from pre-emption and homestead, with the qualification hereinafter indicated, all the public lands in your district and lying within the ten-mile limits as designated in said diagram. Where said lines lay down, in lead pencil, on the township plat, the ten-mile limits of the reserve, on each side thereof, and make the proper notes thereon showing that the lands embraced within said limits are reserved from sale or entry. And as the surveys progress and the township plats are received, he will proceed in like manner to lay down the limits of the reservation and make similar notes, and immediately report the same to this office, so that this order may be strictly observed by withholding the lands in said limits. In virtue, however, of the laws of 1853, and 1854, interests of two classes of settlers are provided for and protected, to-wit:

"1st. By the said act of March 27, 1854, (vol. 10, p. 269) pre-emptors either upon the odd or even sections, who had actually settled before the receipt at your office of this order of withdrawal, have the right, upon establishing their claims according to law, to pay for them at $1.25 per acre, or in virtue of the act of March 22, 1852, to locate the same with warrants.

2d. In accordance with the said act of March 3, 1853, (vol. 10, p. 244), any pre-emptor who, subsequent to the receipt as aforesaid, of the order of withdrawal, and prior to the final allotment of the alternate sections, to the railroad, may settle upon and improve the even-numbered (not odd) sections, and who shall establish their pre-emptions according to law, have a right to do so before the same are offered at public sale, rating the land at $2.50 per acre, with the right to pay for the same in cash, or as stipulated in the last proviso to the first section of the act of March 22, 1852, (vol. 10, p. 3) to pay part in warrants at $1.25, and the residue in cash.

"I would also call your attention to the first section of the homestead act, wherein it is provided, 'that any person,' etc., etc., 'shall' be entitled to enter one quarter section or a less quantity of unappropriated public land, upon which said person may have filed a pre-emption claim, or which may at the time the application is made, be subject to pre-emption at $1.25 or less per acre, or eighty acres, or less, of such unappropriated lands at $2.50 per acre, etc.

"You will, therefore, understand from the foregoing:

"1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry, except so far as inceptive rights may have accrued prior to the recipt by you of this order.

"2d. That under the provisions of the acts of 1853 and 1862 the even sections will only be subject to pre-emption at $2.50 per acre from that date, and dealt with at that ratability under the homestead.

"This order will take effect from the date of its re-

ception at your office, and you will advise this office of the precise time it may be received by you.

"Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner."

We have set out the letter of March 19th, 1863, in full here, because we wish to present it with that part of the act of Congress which just precedes it, in order to bring out clearly the proposition which we will make in the argument that the Commissioner was without authority to make the withdrawal, and the further proposition that he only attempted to withdraw lands which would fall within the actual ten-mile limit of the roads and not lands which would, on the location, fall outside of such place limits.

The Act of Congress of July 26, 1866, (14 Stat. 289) so far as is necessary to consider here, and under which the M. K. & T. Ry. Company made its selections of indemnity lands, is as follows:

"An Act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

"Section 2. Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indiana Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad com-

pany, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: And provided further, that said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"Sec. 3. And be it further enacted, That the grant hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the government

of the United States, free from all cost or charge therefor to the government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of land herein granted within the limits above named and coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: Provided, that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States."

We show this act of 1866 for the purpose of basing a subsequent argument that it shows a legislative construction of the act of 1863 to the effect that the lands granted in that act were open to homestead until the definite location of the road.

The Ry. Company accepted under this act, (Printed record, pages 8 and 39), and was thereby bound by whatever effect it may have upon the act of 1853.

On April 30, 1867, the Commissioner of the General Land Office transmitted to the local land office at Humboldt a letter withdrawing this and other lands from sale or homestead under the act of 1866. (Printed record, page 50.) That letter is as follows:

"Department of the Interior,
General Land Office, April 30, 1867.

Register and Receiver, Humboldt, Kansas:

"Under date of March 19, 1863, I transmitted to you a diagram, showing the designated line of route, with the ten-mile or granted limits of the Leavenworth, Lawrence & Galveston railroad, for which a grant of land is made to Kansas by the Act of Congress approved March 3, 1863.

"By my letter accompanying the diagram, I ordered, with the approval of the secretary, that the odd sections within said limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to pre-emption and homestead entry, at $2.50 per acre.

"Herewith I enclose a map of the actual location of the route of said road, with that portion of the ten and twenty-mile limits designated by sectional lines as falling within your district. You will now withhold from sale or location, pre-emption or homestead entries, all the odd sections within the limits of twenty miles, as laid down on the accompanying diagram, the even sections within the ten-mile limits being held at $2.50, as under the former withdrawal.

"Where settlements may be shown to have been made upon an even section, falling within the lines of the ten-mile limits as originally withdrawn, and within the ten-mile limits, as shown on the present diagram, you will allow the party to prove up and pay for the land at the ordinary minimum price, provided said settlement was made prior to the receipt by you of this order of withdrawal; and for your guidance in this matter, I have marked on the diagram the line of the original withdrawal. Also, where settlement may have been on an odd numbered section outside of the ten and within the twenty-mile limits, prior to the receipt by you of this order of withdrawal, the settler will be protected in his rights by reason of such prior settlement.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner."

This withdrawal was ordered by Congress to be made whenever the road should be definitely located under the act of 1866.

As to the question presented and argued by counsel for plaintiffs in error that Ard is estopped by reason of the decree in the Federal Circuit Court (*U. S.* v. *M. K. & T. Ry. Co.*) we will here respectfully refer the court to the printed record, pages 6 to 35 inclusive, for all the facts upon which such claim of *res adjudicata* or estoppel is based. We will refer to some particular parts of the evidence upon that subject in the argument portion of this brief.

ARGUMENT.

The plaintiffs in error allege but two specific grounds of error, namely—

First.

The court erred in refusing to consider the decision in U. S. v. *M. K. & T. Ry. Co., Alexander Brandon et al,* as conclusive in Brandon's favor.

Second.

The court erred in holding that the withdrawal of March 19th, 1863, was ineffectual to withdraw the land from the class subject to homestead and pre-emption and in holding that Ard acquired equities by his settlement, as against Brandon.

See their brief, page 7.

We will take up these propositions in the same order.

I.

Is the judgment against the plaintiff (The United States) and in favor of the railroad company, in the federal case, *res adjudicata* as to the issues and parties in the case at bar?

In support of our contention that it is not, we cite the following authorities:

Ard v. *Brandon,* 156 U. S., 537; 39 L. ed., 524;
Black on Judgments, No. 540;
Freeman on Judgments, 4th ed., No. 188-189, Vol. 1;
Hall v. *Finch,* 104 U. S., 261;
Patton v. *Caldwell,* 1 Dall., 419;
Litchfield v. *Crane,* 123 U. S., 551; 31 L. ed., 199;

Apsden v. *Nixan*, 45 U. S., 467 (4 How.) 11 L. ed., 1059;
Bank v. *Stone*, (6th Circuit) 88 Fed., 413;
Australian Knitting Co. v. *Gormley*, 138 Fed., 92;
Wilgus v. *German*, 72 Fed., 773;
Pendleton v. *Russell*, 144 U. S., 640; 36 L. ed., 574;
Central Baptist Church v. *Manchester*, 17 R. I., 492; 33 Am. St. Rep., 893;
Jones v. *Vert*, 121 Ind., 140, 16 Am. St. Rep., 379;
Cannon River, etc., Ass'n v. *Rogers*, 42 Minn., 123, 18 Am. St. Rep., 497;
Park v. *Ensign*, 66 Kan., 50;
United States v. *San Jacinto Tin Co.*, 125 U. S., 273; 31 L. ed., 747;
Stryker v. *Crane*, (*or Goodnow*), 123 U. S., 527; 31 L. ed., 194;
Brandon v. *Ard*, 74 Kan., 424;
Wilkie v. *Howe*, 27 Kan., 578;
Keizer v. *Paper Co.*, 71 Kan., 305.

II.

The second specification of error (Brief of plaintiff in error, page 7) claims that the Kansas Supreme Court erred in holding that the letter of withdrawal, (printed record, pages 35, 36 and 37) of March 19th, 1863, was ineffectual to withdraw the land from the class of lands subject to homestead and pre-emption, and in holding that Ard acquired equities by his settlement as against Brandon.

As against such claim of error, we cite the following authorities:

L. L. & G. R. R. Co. v. *U. S.*, 92 U. S., 733-760, 23 L. Ed., 634;
M., K. & T. Ry. Co. v. *Kas. Pac. Ry. Co.*, 97 U. S., 491;
Ard v. *Brandon*, 159 U. S., 537, 39 L. Ed., 524;

Clements v. *Warner*, 65 U. S., 394;
Duluth Iron Range Rld. Co. v. *Ray*, 173 U. S., 587, 43 L. Ed., 820;
Weeks v. *Driddman*, 159 U. S., 541, 40 L. Ed., 253;
U. S. v. *M., K. & T. Ry. Co.*, 141 U. S., 358, 35 L. Ed., 766;
K. P. Ry. Co. v. *A. T. & S. F. Rld. Co.*, 112 U. S., 414, 28 L. Ed., 794;
Hewitt v. *Schultz*, 180 U. S., 139, 45 L. Ed., 463;
Nelson v. *Nor. Pac. Ry. Co.*, 188 U. S., 108, 47 L. Ed., 406;
Spoli v. *Dreschel*, 199 U. S., 564;
Southern Pac. Ry. Co. v. *Bell*, 183 U. S., 675, 46 L. Ed., 383;
Holmes v. *U. S.* (9th Circuit) 55 C. C. A., 489, 118 Fed., 995;
Moore v. *Carmode*, 180 U. S., 167, 45 L. Ed., 476;
Northern Pac. R. Co. v. *Miller* (Secretary Vilas), 7 Land Dec., 100;
Shepley v. *Cowan*, 91 U. S., 330, 23 L. Ed., 424.

We have carefully selected the authorities under each of the above specifications of error and respectfully submit them in the belief that they truly express the law of this case upon each of the questions involved; and that they fully justify the judgment of the court below. And we have thus grouped the authorities under each head, so that the court will be at no inconvenience to know the relevancy of each authority to the proposition upon which we claim it sustains our position.

And now, we will briefly discuss the first proposition, namely: That the claims of Ard, in the case at bar, are not concluded by the judgment against the government in the case of *United States* v. *M. K. & T. Ry. Co.*, (Printed record, pages 29 to 33 for Master's Report; 34 and 35 for decree of Circuit Court)

rendered by the Circuit Court of the United States for District of Kansas in 1900.

The evidence upon this subject went in over the defendant's objection as to relevancy, competency and materiality, and upon the specific ground that Ard was not a party to the suit in the Federal Court (Printed record, page 52).

But if it were properly admitted, it fails to show that Ard was a party to that suit. There are three things necessary in order that a person may be concluded by a judgment to which he does not appear as a party upon the record, namely: First: "That the person intervening should come in for the assertion or protection of some claim or interest of his own, either in the subject matter of the litigation or consisting in a responsibility over to the defendant which will attach if judgment goes against him, and resting either on some covenant or an implied obligation to indemnify him. Second: That he must have defended (or prosecuted) the action avowedly, and with notice to the opposite party, and not upon a secret understanding. Third: That his interposition must have been so complete that he was practically substituted for the defendant (or plaintiff) in the management and control of the case, and it is said that it is not enough to conclude him that he employed the attorney who appeared for the party of record, or testified as a witness, or was present and aided in the conduct of the trial, or cross examined the witnesses, or lent assistance in money or service to the defendant (or plaintiff) or joined in taking an appeal."

The words "or plaintiff," in brackets are ours.

Central Baptist Church, Etc., v. *Manchester*, 17 Rhode Island, 492, 33 Amer. St. Rep., 893, Opinion 895-96;

Black on Judgments, No. 540.

"One not a party to an action, nor notified of its pendency, having no opportunity or right to control the defense, to introduce or cross examine witnesses, or to prosecute a writ of error from the judgment therein, is not bound by such judgment."

Hale v. *Finch*, 104 U. S., 261.

"A prior adjudication is not binding on, nor conclusive as to the rights of, one who was not a party to the suit in which the adjudication was had, although he interested himself in securing the adjudication and paid part of the expenses of the suit; those only who are represented by the parties, and claim under them, or in privity with them, are bound by a judgment."

Litchfield v. *Crane*, 123 U. S., 551, 31 L. Ed., 199.

"A brief filed at a hearing in this court by one interested in the question to be decided, does not make him a party to the suit, or bind him or estop him, by the decree."

Stryker v. *Crane*, 123 U. S., 527, 31 L. Ed., 194.

But, in any event, it cannot be reasonably claimed that an individual could, or would be allowed to control and direct the government and its officers in commencing and carrying on a suit in which the government is interested. It would be an unheard of rule, to hold that a private citizen dare not assist his government on a suit to cancel an instrument procured from it by fraud, lest by so doing he should estop himself from claiming rights which he had already attained.

The suit in question was commenced by the Attorney General under the act of Congress (Mar. 3, 1887, 24 St. p. 556) which directed the Secretary of the Interior "to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants by Congress to aid in the construction of railroads and heretofore adjusted."

There is nothing in the record to show that Ard was a

ward of the government or that he constituted the government his trustee to litigate his rights for him. He was asking no judgment in his favor and no one was asking one against him. It was an action concerning only the United States on the one hand and the railroad company and its grantees on the other, and the question litigated was whether the patentee railroad company or its grantees had the right to hold the naked legal title as between them and the government which had issued the patents. The government does not warrant title by its patents, and when Brandon bought of the railroad company he was presumed to know that he was only taking whatever interest the company had, and that if the patent was void his title would fall with it.

> "A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel or annul any patent for land issued in its name, on the ground that it was obtained by fraud or mistake."
>
> "The initiation and control of such a suit lies with the Attorney General as the head of one of the executive departments."
>
> 1 and 2 of syllabus, *United States* v. *San Jacinto Tin Co.*, 125 U. S., 273, 31 L. Ed., 747.

The whole contention of counsel for plaintiff in error upon this question is based upon the assumption that Ard, as a member of the Settlers' Protective Association helped to induce the commencement of the action and lent some assistance in carrying it on, (printed record, pages 42 and 43). We say Ard was in no sense a party to that suit. His equities were not litigated there. They could not have been. He never assumed to have or exercise the rights or privileges of a party there.

The record of the federal case introduced in this case to

show *res adjudicata* does not show that the letter of withdrawal March 19th, 1863, was introduced as evidence, nor that it was relied on in the pleadings.

The case of *Sage* v. *Railroad Co.*, 93 U. S., 412, cited by plaintiffs in error, is not in point here as showing that Ard had the right of appeal. In the Sage case, the parties taking the appeal were holders of bonds secured by mortgage upon a railroad and which was being foreclosed in the interest of all of them, but a majority of the holders had agreed to a certain decree to which the minority objected. The minority parties took the appeal.

In conclusion upon this branch of the case, we invite consideration of the authorities cited in the opening part of this argument.

II.

THE LETTER OF WITHDRAWAL ISSUED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE MARCH 19, 1863, WAS WITHOUT AUTHORITY OF LAW AND WAS INEFFECTUAL TO WITHDRAW THE LAND IN CONTROVERSY FROM THE CLASS OF LANDS SUBJECT TO HOMESTEAD, AND IS INEFFECTUAL TO MAKE GOOD THE LEGAL TITLE OF BRANDON AS AGAINST THE PRIOR AND SUPERIOR EQUITY OF ARD IN THE LAND.

This letter of withdrawal appears upon page 35 *et. seq.* of the printed record. It shows upon its face that it was made by the commissioner without any plat or map of either a general or definite location of any road to be benefited by the act of March 3, 1863, and was made solely upon the request of senators and representatives in Congress from Kansas. It shows that the commissioner made a diagram of his own pursuant to information he had from outside individuals of what was as-

sumed to be the probable route of such roads, and on such assumption the diagram and letter were transmitted to the local land office at Humboldt, Kansas, instructing them to withhold from sale, preemption or homestead entry all lands within ten miles on either side of such probable or assumed route.

The letter in full also appears in the statement of fact preceding the argument in this brief.

There was no road ever built upon such probable line as shown by said diagram and letter, and when the roads, to-wit: The L., L. & G. and the M., K. & T., were finally and definitely located, it left the land in controversy entirely outside the place or ten mile limit of each road and within the indemnity limits of each road (Printed record, page 6). The M., K. & T. Railway Company filed its map of definite location in December, 1866; but it did not make its selections of indemnity lands until August 8, 1872, and such selection was not approved until April 10, 1873 (Printed record, page 41).

This letter of withdrawal was introduced upon the trial of the cause over the objection of the defendant below and defendant in error (See printed record, page 52).

We cannot make a better argument upon this subject as against the contention of plaintiffs in error here than appears in the opinion of the Kansas Supreme Court in this case, 74 Kans., page 431 to 437 inclusive; because in that opinion that court very carefully and ably discussed this letter of withdrawal and the question whether or not the commissioner of the general land office had authority to make it, and whether or not it was effective to aid the plaintiffs in error in their contention against the defendant in error as to the title in question. Said opinion ap-

pears in the printed record of this case at page 58 to 63 inclusive.

The act of March 3, 1863, under which the railroad and Brandon, its grantee, claims title through the patent subsequently issued to the railroad, reads in part as follows:

> "That there be, and is hereby, granted to the State of Kansas for the purpose of aiding in the construction of a railroad and telegraph from the City of Leavenworth by way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the state, in the direction of Galveston Bay, in Texas, etc., etc. Every alternate section of land, designated by odd numbers for ten sections in width on each side of said roads, and each of its branches.
>
> "But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; * * *

In regard to the construction of the act of March 3, 1863, the Supreme Court of Kansas, in its opinion, (printed record, pages 59 and 60), say:

> "Regardless of any interpretation subsequently placed upon the order of withdrawal of March 19, 1863, by the land commissioner and regardless also of what such order

contained, the grant itself reserved from its operation all of the public domain which had, prior to the definite location of any line of road, been sold by the United States or otherwise reserved, and all the lands to which, prior to such definite location, the right or preemption of homestead settlement had attached and lands falling within any of these provisions when the line was definitely fixed were excluded from the granting clause of the act. Ard's homestead rights attached prior to the definite location of any line of railroad. He is therefore within the exact provision of one of the reservations in the grant. The pretended withdrawal, if given the effect contended for by plaintiffs in error, would be giving such cummissioner power to nullify one of the important reservations in the grant."

We fully agree with that conclusion. That part of the act of Congress which we have just quoted above, shows that Congress intended that all the land comprehended in said grant, or that might be taken under said grant, should be left open to settlement under the homestead laws until the line of the road to be benefited by the grant should be definitely located; and while nothing is said expressly prohibiting an executive withdrawal, the prohibition is so plainly implied that there can be no mistake as to the meaning of the act in that respect; and to show that such was the understanding of all parties concerned during the period from March, 1863, to July, 1866, we have shown in the statement of facts preceding the argument, a part of the act of July 26, 1866, which was made for the benefit of the M., K. & T. Ry. Co.

In that act Congress renewed the grant to the odd numbered sections, but limited the absolute or place part of the grant to five miles on each side of the road; and in Section 2 of that act the following language is used:

"* * * But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act."

Thereby reiterating the reservation as to homestead entry which is found in the act of 1863.

Section 4 of said act of 1866 is as follows:

"And be it further enacted, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

This language of Section 4 undoubtedly shows that it was the understanding of Congress that up to the time of the act of 1866 the land was not subject to withdrawal by the land commissioner, because in that section the Secretary of the Interior is directed to withdraw the land comprehended by the grant as soon as the railroad company shall file maps of its line designat-

ing the route thereof. Pursuant to this act of 1866 the commissioner of the general land office, on April 30, 1867, issued a letter of withdrawal and transmitted it to the local land office at Humboldt, Kansas (See printed record, page 50). The commissioner, in that letter, in the last paragraph thereof, says:

> "Also, where settlement may have been made on an odd numbered section outside of the ten and within the twenty mile limits, prior to the receipt by you of this order of withdrawal, the settler will be protected in his right by reason of such prior settlement."

This language shows that the land department, at that time, did not consider the 1863 withdrawal as of any effect.

Upon the question of the authority of the land commissioner to make the order of withdrawal of March 19, 1863, the very nature of the grant by Congress and the surrounding circumstances should be taken into consideration, in order to ascertain what was intended by the act. While the grant was in *presenti* and covered all the odd sections which should appear on the location of the road to have been within the grant when it was made, yet it could not become effective and was not intended to become so, until the line of the road was definitely located and the Interior Department had notice of such location. Therefore, the road's title was in the nature of a float, and it depended on the diligence of the railroad company in locating its line and performing its duties under the grant, whether or not more or less of said lands might, between the date of the grant and the location of the road, be taken up by homestead settlement.

Such construction is plainly given to this act by this court in the case of *L. L. & G. Rld. Co.* v. *U. S.*, 92 U. S., 733; 23 L.

Ed., 634. In that opinion, speaking of what Congress meant, Mr. Justice Davis said in part:

> "It would imply also that Congress meant that the companies, instead of building the road as soon as practicable, should profit by delay. Surely these implications cannot be indulged in such a grant unless its language leaves no other alternative. Instead of this, the words employed should clearly show that the only purpose of that clause is to give the lands outside of the ten mile limit for those lost inside, by the action of the government in keeping the land offices open between the date of the granting act and the location of the road."

In the same case, in a dissenting opinion, which dissent was upon matters in the case unnecessary to discuss here, Mr. Justice Field, in regard to that act, used the following language:

> "The sections granted could only be ascertained when the route of the road was established, but, as this might take years, the government did not in the meantime withhold the lands from settlement and sale upon any notion that the route might possibly pass through or near them. It kept the lands generally open to the settler or pre-emptor, and subject at all times to appropriation for public uses; and the object of the general reservation mentioned was to provide for the possible acquisition of interests in this way to lands falling within the limits of the grant. When they did so fall, other lands in their places were to be selected. It was only when the road was definitely fixed that the right of sale or settlement or reservation ended, and the title previously floating attached to the land subject to the grant. This was the construction adopted by the Land Department, and was the one which most fully fitted in with the general policy of the government in other cases in the disposition of the public lands."

Later, in the case of *U. S.* v. *M. K. & T. Ry. Co.*, 141 U. S., 358, 35 L. Ed., 766, the Supreme Court, in an opinion written by

Mr. Justice Harlan, gave the same construction to it; and in that opinion the withdrawal of April 30, 1867, seems to be held as the first lawful act by which such lands were taken from the class which were subject to homestead entry. It was claimed in that case that though the roads might delay locating their lines, yet that from the time of the grant the lands were not open to settlement. Upon that subject the court said:

> "The case made by the admitted averments of the bill is one of sheer spoilation on the part of the company of the rights of settlers, at least of those whose rights attached prior to the withdrawal of 1867."

The case of *Kan. Pac. Ry. Co.* v. *A. T. & S. F. Rld. Co.*, 112 U. S., 414; 28 L. Ed., 794, shows a very clear construction of this act to the same effect by the Supreme Court of the United States in an opinion written by Mr. Justice Field. It also goes farther than the other cases, in this respect, that it is there held that there could have been no withdrawal of lands falling outside of the ten mile limit of the road upon definite location, and that opinion clearly shows that the Supreme Court recognized the reservation for homestead purposes of all such lands, up to the time of definite location of the road.

The court says in part:

> "By the very terms of the grant to Kansas, as we have seen, there were excepted from it any sections or parts thereof which the United States had sold or reserved for any purpose or to which a pre-emption or homestead settlement had attached, before the line of the road or its branches had been definitely fixed. And the secretary was required to select, for like purposes, outside of the limits of the grant, as much lands, says the Act, 'as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settle-

ments have attached as aforesaid.' The reservation for any purpose is thus made to cover not merely a specific reservation in terms for the use of the United States, but any appropriation of the lands by the government.

"The line of the road of the Atchison, Topeka & Santa Fe Company was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant, much less so of lands without them, was in no respect an impairment of its rights. The appropriation outside of those limits only lessened the number of sections from which the secretary might, under certain contingencies, have the right to select indemnity lands. It had no other effect. The order of withdrawal of lands along the 'probable lines' of the defendant's road, made on the 19th day of March, 1863, by the commission of the general land office, affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant. And besides, it only purported to apply to lands within the ten mile limit, and the lands in controversy lie outside of it, although the court below overlooking the stipulation of the parties, stated the fact to be otherwise; an error which probably misled it to its conclusion."

It seems to us quite clear that these decisions are all that need be cited in support of the correctness of the opinion of the Supreme Court of Kansas in this case, but we are not without further authority upon this subject, because the cases arising under the various land grants from Congress to roads have been numerous and no phase touching the contention between settlers and the roads, or their grantees, seems to have been left undetermined.

The grant of 1864 to the Northern Pac. Rld. Co., which read practically like the act of 1863 under consideration here, was construed by this court in the case of *Hewitt* v. *Schultz*, 180 U. S., 139; 45 L. Ed., 463. In the opinion in that case the

court, upon the question of the authority of the land commissioner to withdraw lands from the definite location of the road, cites and reaffirms its opinion in that respect as to the act of March 3. 1863, in the case of *Kansas Pacific* v. *A. T. & S. F. Ry. Co.*, 112 U. S., 414.

Then the question arose again in the case of *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S., 108; 47 L. Ed., 406-425. There is was contended that a withdrawal, whether authorized or not, was sufficient to take the lands out of the category of public lands; but it was held that the withdrawal was ineffective and that the settler, though having been refused by the local land office—as Ard in this case, the right to perfect his homestead entry, had a superior equity in the land to the title claimed by the railroad company under the grant.

The facts of this case in many respects are substantially like the facts in the case at bar (*Ard* v. *Brandon*, 156 U. S., 547), which is cited there upon the point that the government recognizes the superior equity of a settler to become the purchaser of a limited extent of land, over that of any other person.

The same question came up again in the case of *Sjoli* v. *Dreschel*, 199 U. S., 564; 50 L. Ed., 311. In that case it is said by the court in part:

> "From the numerous cases in this court relating to the above act of July 2, 1864, the following propositions are to be deduced: * * * That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior;
>
> "That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under

the pre-emption and homestead laws of the United States; and

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

In the last mentioned case the Supreme Court of the United States review a large number of former decisions, among which are the various cases that had previously been determined concerning the act of March 3, 1863; and these decisions under the grant to the Northern Pacific are all in harmony with the earlier decisions of this court concerning said act of 1863.

We have not commeated upon all of the authorities which are cited in the beginning of our argument upon this branch of the case; but a casual reading of any of them will show that they are all clearly in point and sustain our position which we have here undertaken to show as being clearly right.

There is one further proposition comprehended by the pleadings in this case and by the procedure in the State of Kansas in such cases as this; and that is, does the fifteen year statute of limitations of the State of Kansas apply to the cause of action set forth in the petition, and can it be relied upon as a defense in this case?

In an ejectment suit in Kansas any defense which will defeat the plaintiff's claim is available under a general denial, and therefore evidence of actual and undisturbed and hostile possession for more then fifteen years before the commencement of an action is admissible to show title.

Section 4444 of the General Statutes of the State of Kansas, compilation of 1901, being Section 16 of Chapter 80 of said compiled statutes, reads as follows:

"Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed after the cause of action shall have accrued, and at no time thereafter;

Subdivision Fourth: "An action for the recovery of real property not hereinbefore provided for within fifteen years."

This is the statute which applies to cases of this character.

Section 2, 14 Stat., 67, being act of June 21, 1866, Chapter 127, gave him the right to make final proof at the end of five years after such homestead entry, and thus his title would have become complete by patent, had he not been wrongfully deprived therefrom by the land office, had he proceeded under the homestead laws to complete such title, and it will be presumed that he would have done so; so he should have had a patent on the 14th day of July, 1871.

This action was commenced on the 16th day of May, 1887 (printed record, page 3),—nearly sixteen years after his title should have been perfected.

That this claim of adverse possession is good, we cite:

Dibble v. *Bellingham Bay Land Co.*, 163 U. S., 63; 41 L. Ed., 72;
Simmons v. *Wagner*, 101 U. S., 260; 25 L. Ed., 910;
Barney v. *Dolph*, 97 U. S., 652; 24 L. Ed., 1063.

Respectfully submitted,

OSCAR FOUST,
EWING, GARD & GARD,